Public Prosecutor v Dato' Saidin bin Thamby

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-06B-24 OF 2009
ABDUL MALIK ISHAK, AZHAR MA'AH AND MOHTARUDIN BAKI JJCA
6 APRIL 2012

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Criminal Law — Corruption — Corruptly receiving gratification — State Assemblyman charged with corruptly receiving RM1m commission to help company obtain approval of application for state land — Whether receipt of commission unlawful — Whether acceptance of commission must be unlawful to render receipt of it corrupt — Whether there was evidence to show payment was bribe — Prevention of Corruption Act 1961 s 3(a)(i)

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The respondent was convicted by the sessions court for an offence under s 3(a)(i) of the Prevention of Corruption Act 1961 ('PCA') and sentenced to a year's jail and fined RM10,000 in default six months' jail. He was also ordered to pay a penalty of RM1m to the Federal Government. He was found guilty of corruptly receiving from a director ('SP1') of a company, a RM1m gratification for himself as remuneration for helping the company ('Nusantara') obtain approval of the Selangor State Executive Council ('Exco') of its application for a piece of state land ('the land') for development. The High Court allowed the respondent's appeal against conviction and sentence (including the penalty), acquitted and discharged him and dismissed the prosecution's cross-appeal against sentence. Against that decision, the prosecution appealed to the Court of Appeal. At the time of the alleged offence, the respondent was a Selangor State Assemblyman but not an Exco member. He was also head of the Selayang Umno Division and was close to the then Menteri Besar of Selangor ('SP18'). For the purpose of development of the land, Nusantara entered into a joint-venture with another company ('Adiras'), among whose directors was a person named Bill Chin. In his testimony at the trial, SP1 alleged the respondent had solicited from Nusantara, through Bill Chin, RM1m for himself and another RM1m for SP18 to facilitate approval of the application for the land. SP1 had said that sometime after Nusantara's application for the land was approved by the Exco (which SP18 testified had succeeded on its own merits), he went to the respondent's house to hand over to him a crossed cash cheque for RM1m purportedly being Nusantara's donation to the Selayang Umno Division's building fund. The respondent banked in the cheque into his personal account and did not issue any receipt for the sum which prompted SP1 and another director of Nusantara to later write complaint letters to the then Deputy Prime Minister alleging the respondent had embezzled the RM1m contribution to the Selayang Umno Division. In his defence, the

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respondent denied having solicited any bribe from any of the directors of Nusantara or Adiras but admitted he had asked SP18 to assist in Nusantara's application for the land. The respondent said he initially thought the cheque was meant to be passed on to Bill Chin, on whose behalf he had negotiated with SP1 for payment of compensation to Bill Chin as a result of Nusantara's termination of its joint-venture with Adiras. Only later did the respondent realise the cheque was Nusantara's payment of his commission for assisting in the approval of the company's land application.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) To prove 'corruptly' in s 3(a)(i) of the PCA, the prosecution had to show the purpose of the gratification was an unlawful one. The gratification he was alleged to have received corruptly was not proved beyond reasonable doubt (see paras 73 & 189).

(2) The receipt of the cheque by the respondent was done in the course of a lawful and legal business deal between SP1 and the respondent and not corruptly as was painted by SP1 (see para 168).

(3) As a state assemblyman (and not Exco member), the respondent could carry out any trade or business and if he was promised a commission and such commission was given to and received by him, that was legally permissible under s 2(d) of the Contracts Act 1950. There was no law which prohibited the respondent from obtaining a commission for helping Nusantara's land application to be approved (see para 187).

(4) The concern was not with a moral wrong but a legal wrong. There was nothing reprehensible when a State Assemblyman made a commission legally and legitimately. But that commission must not be corruptly received in the context of s 3(a)(i) of the PCA (see paras 190–191).

(5) While the charge stated that the cheque was a gratification to the respondent as reward for a favour shown, not only SP1 himself, but other prosecution witnesses, SP3, SP4, SP6, SP8 and Bill Chin, all testified that the RM1m was a political donation to Umno Selayang's building fund. None of them said it was paid to the respondent as a gratification. This meant the giver of the RM1m, SP1, had never bribed the respondent. For an offence to be committed under s 3(a)(i) of the PCA the gratification had to be 'bribe money' and nothing else (see paras 90–92).

(6) In its written judgment the trial court invoked s 8 of the PCA — which concerned an entirely different offence — to convict the respondent under s 3(a)(i) without amending the charge at the end of either the prosecution's or the defence's case or before judgment was pronounced. This was a grave error of law and a breach of natural justice that warranted appellate intervention (see paras 144 & 154).

(7) SP1's credibility left much to be desired. He had lied in his evidence about various significant matters. He did not lodge a police report to complain he was forced by the respondent to give him the cheque. He was an interested witness and his evidence was not corroborated by Bill Chin whose evidence, in fact, contradicted SP1's and exculpated the respondent and SP18 of corruptly soliciting any gratification (see paras 122, 124 & 165).

[Bahasa Malaysia summary

Responden telah disabitkan oleh mahkamah sesyen kerana kesalahan di bawah s 3(a)(i) Akta Pencegah Rasuahan 1961 ('APR') dan dihukum penjara selama setahun dan dendan RM10,000 dan jika gagal enam bulan penjara. Dia juga telah diperintah untuk membayar penalti RM1 juta kepada Kerajaan Persekutuan. Dia telah didapati bersalah kerana telah menerima rasuah daripada pengarah ('SP1') sebuah syarikat, suapan RM1 juta untuk dirinya sendiri sebagai imbuhan kerana membantu syarikat tersebut ('Nusantara') mendapat kelulusan Majlis Undangan Negeri Selangor ('Exco') berhubung permohonannya untuk sebidang tanah kerajaan negeri ('tanah') untuk pembangunan. Mahkamah Tinggi membenarkan rayuan responden terhadap sabitan dan hukuman (termasuk penalti), melepas dan membebaskannya dan menolak rayuan balas pendakwaan terhaap hukuman. Membantah keputusan tersebut, pendakwaan telah merayu ke Mahkamah Rayuan. Pada masa kesalahan yang dikatakan, responden merupakan Ahli Undangan Negeri Selangor dan bukan ahli Exco. Dia juga Ketua Bahagian UMNO Selayang dan rapat dengan Menteri Besar Selangor ('SP18'). Bagi tujuan pembangunan tanah, Nusantara telah memasuki usaha sama dengan syarikat lain ('Adiras'), yang mana antara pengarahnya bernama Bill Chin. Dalam keterangan lisannya semasa perbicaraan, SP1 mendakwa responden telah mendapatkan daripada Nusantara, melalui Bill Chin, RM1 juta untuk dirinya sendiri dan RM1 juta lagi untuk SP18 kerana mendapatkan kelulusan permohonan tanah itu. SP 1 telah menyatakan bahawa selepas permohonan tanah Nusantara diluluskan oleh Exco (yang mana keterangan SP18 telah berjaya atas meritnya sendiri), dia telah pergi ke rumah responden untuk menyerahkannya cek tunai berpalang RM1 juta bermaksud untuk derma Nusantara kepada dana bangunan Bahagian UMNO Selayang. Responden telah memasukkan cek tersebut ke dalam akaun peribadinya dan tidak mengeluarkan apa-apa resit untuk jumlah itu yang menyebabkan SP1 dan seorang pengarah lain Nusantara menulis surat aduan kepada Timbalan Perdana Menteri ketika itu mendakwa responden telah menggelapkan sumbangan RM1 juta itu kepada Bahagian UMNO Selayang. Dalam pembelaannya, responden menafikan telah mendapatkan apa-apa sogokan daripada mana-mana pengarah Nusantara atau Adiras tetapi mengaku dia telah meminta SP18 membantu dalam permohonan tanah Nusantara. Responden mengatakan dia pada mulanya memikirkan cek itu bermaksud untuk diserahkan kepada Bill Chin, yang mana dia telah berunding bagi pihaknya dengan SP1 untuk bayaran pampasan kepada Bill Chin akibat

daripada penamatan Nusantara terhadap usaha samanya dengan Adiras. Hanya selepas itu responden menyedari yang cek itu adalah bayaran Nusantara untuk komisyennya kerana membantu dalam kelulusan permohonan tanah syarikat tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Bagi membuktikan 'corruptly' dalam s 3(a)(i) APR, pendakwaan perlu membuktikan tujuan suapan adalah menyalahi undang-undang. Suapan yang dikatakan telah diterimanya secara korup tidak dibuktikan melampaui keraguan munasabah (lihat perenggan 73 & 189).

(2) Penerimaan cek oleh responden telah dilakukan dalam urusan perniagaan yang sah dari segi undang-undang antara SP1 dan responden dan tidak secara makan suap sebagaimana yang digambarkan oleh SP1 (lihat perenggan 168).

(3) Sebagai ahli dewan undangan negeri (dan bukan ahli Exco), responden boleh menjalankan apa-apa dagangan atau perniagaan dan jika dia dijanjikan komisyen dan komisyen itu telah diberikan kepada dan diterima olehnya, ia dibenarkan dari segi undang-undang di bawah s 2(d) Akta Kontrak 1950. Tiada undang-undang yang melarang responden daripada mendapatkan komisyen kerana membantu permohonan tanah Nusantara diluluskan (lihat perenggan 187).

(4) Apa yang dikhuatiri bukan kesalahan moral tetapi kesalahan dari segi undang-undang. Tiada apa yang dikeji apabil ahli dewan undangan negeri mendapat komisyen secara sah dari segi undang-undang dan sah. Namun komisyen itu tidak patut diterima secara korup dalam konteks s 3(a)(i) APR (lihat perenggan 190–191).

(5) Walaupun pertuduhan menyatakan bahawa cek itu adalah suapan kepada responden sebagai ganjaran untuk bantuan yang diberi, bukan hanya SP1 sendiri, tetapi saksi-saksi pendakwaan lain, SP3, SP4, SP6, SP8 dan Bill Chin, semua memberi keterangan bahawa RM1 juta itu adalah derma politik kepada dana bangunan UMNO Selayang. Tiada daripada mereka yang mengatakan ia telah dibayar kepada responden sebagai suapan. Ini bermakna pemberi RM1 juta itu, SP1, tidak menyogok responden. Untuk satu kesalalahan dilakukan di bawah s 3(a)(i) APR suapan perlu merupakan 'wang sogokan' dan bukan selain itu (lihat perenggan 90–92).

(6) Dalam penghakiman bertulis mahkamah perbicaraan menggunakan s 8 APR — berkaitan kesalahan yang berbeza — untuk mensabitkan responden di bawah s 3(a)(i) tanpa meminda pertuduhan di akhir kes pendakwaan atau pembelaan atau sebelum penghakiman disampaikan.

Ini adalah kesilapan besar dari segi undang-undang dan pelanggaran keadilan asasi yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 144 & 154).

(7) Kebolehpercayaan SP1 adalah dikhuatiri. Dia telah berbohong dalam keterangannya tentang beberapa perkara penting. Dia tidak membuat laporan polis untuk mengadu yang dia telah dipaksa oleh responden untuk memberinya cek. Dia merupakan saksi berkepentingan dan keterangannya tidak disokong oleh Bill Chin yang mana keterangannya, pada hakikatnya, bertentangan dengan SP1 dan membebaskan responden dan SP18 daripada telah menerima secara korup apa-apa suapan (lihat perenggan 122, 124 & 165).]

Notes

For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 138–150.

Cases referred to

Ah Mee v PP [1967] 1 MLJ 220, FC (refd)
Ahmad Shah bin Hashim v PP [1980] 1 MLJ 77, FC (refd)
Ahmad Zaini bin Japar v TL Offshore Sdn Bhd [2002] 1 AMR 369, HC (refd)
Anwar Hussain and another v The State AIR 1952 Assam 47, HC (refd)
Choong Oi Choo v Public Prosecutor and another case [1986] 2 CLJ 231, HC (refd)
Cooper v The Board of Works for the Wandsworth District (1863) 14 CB (NS) 180 (refd)
Director of Public Prosecutions v Kilbourne [1973] 1 All ER 440, HL (refd)
Habibulla Khan v State of Orissa and another [1993] Cri LJ 3604, HC (refd)
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230, FC (refd)
Harihar Chakravarty v The State of West Bengal AIR 1954 SC 266, SC (refd)
King, The v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256 (refd)
Lejzor Teper v The Queen [1952] AC 480, PC (refd)
Leong Hong Khie v PP, Tan Gong Wai v PP [1986] 2 MLJ 206, FC (refd)
Lim Ah Oh and Anor v Rex [1950] MLJ 269, CA (refd)
Lim Beh & Ors v Opium Farmer [1842] 3 Ky 10 (refd)
Lim Kheng Kooi & Anor v Reg [1957] MLJ 199 (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379, FC (refd)
Oh Keng Seng v Public Prosecutor [1974] 2 MLJ 48 (refd)
Padmakar Balkrishna Samant v Abdul Rehman Antulay and another [1984] 2 SCC 183, SC (refd)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276, FC (refd)
PP v Dato Haji Mohamed Muslim bin Haji Othman [1983] 1 MLJ 245 (refd)
PP v Datuk Hj Harun bin Hj Idris (No 2) [1977] 1 MLJ 15 (distd)
PP v Datuk Haji Dzulkifli [1982] 1 MLJ 340 (refd)
PP v Heng You Nang [1949] MLJ 285 (refd)

PP v James Tan [1983] 2 MLJ 173 (refd)
PP v Mohamed Ali bin Mohamed Amin & Anor [1979] 2 MLJ 57 (refd)
PP v Tan Kim Kang & Ors [1962] MLJ 388 (refd)
PP v You Kong Lai [1985] 1 MLJ 298 (refd)
R v Baskerville [1916] 2 KB 658, CA (refd)
Ram Prasad and others v State, through Jai Narain and another AIR 1952 Allahabad 878, HC (refd)
Ramkrishna Sawalaram Redkar v State of Maharashtra [1980] Cri LJ 254, HC (refd)
Rattan Singh v PP [1971] 1 MLJ 162 (refd)
Regina v London Rent Assessment Panel Committee, ex parte Metropolitan Properties Co (FGC) Ltd [1968] 3 WLR 694; [1969] 1 QB 577, CA (refd)
Regina v Secretary of State for the Home Department, ex parte Doody, Same v Same, ex parte Pegg, Same v Same, ex parte Pierson, Same v Same, ex parte Smart [1994] 1 AC 531, HL (refd)
Rex v Lim Yam Hong 14 SSLR 152 (refd)
Royal British Bank, The v Turquand (1856) 6 El & Bl 327; (1856) 119 ER 886 (refd)
Sarwan Singh Rattan Singh v State of Punjab AIR 1957 SC 637, SC (refd)
Singah Mohamed Hussin v PP [1973] 2 MLJ 109 (refd)
Subramaniam v PP [1956] MLJ 220, PC (refd)
Tay Choon Nam & 2 others v Rex [in this case an application to the Privy Council for special leave to appeal was disallowed but the decision of the Board has not yet been received Ed MLJ] [1949] MLJ 157 (refd)
Walter Annamunthodo v Oilfields Workers' Trade Union [1961] AC 945, PC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283, CA (refd)
Yoong Hock Pin v PP [1977] 1 MLJ 178, FC (refd)

Legislation referred to

Contracts Act 1950 s 2(d), (e)
Criminal Procedure Code ss 158(1), 169
Evidence Act 1950 s 60
Laws of the Constitution of Selangor art 58(3)
Penal Code s 405
Prevention of Corruption Act 1961 (Repealed by the Anti-Corruption Act 1997) ss 2, 2(d), 3(a)(i), (a)(ii), 4(a), 8, 18

Appeal from: Criminal Appeal No 42–17 of 2002 (High Court, Shah Alam)

Abdul Razak bin Musa (Nurul Eylia bt Yunus with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Muhammad Shafee bin Muhammad Abdullah (Badrul Munir and Sarah Maalini Abishegam with him) (Shafee & Co) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Dato' Saidin bin Thamby ('the respondent') was charged on 15 September 1999 in the Shah Alam Sessions Court ('trial court') for committing an offence of corruption under s 3(a)(i) of the Prevention of Corruption Act 1961 (Revised 1971) Act 57 ('PCA') for *corruptly receiving* from one Dato' Dr Hanifah bin Nordin ('SP1'), the managing director of a company known as Syarikat Nusantara Network Sdn Bhd ('Nusantara'), for himself a gratification of RM1m vide a crossed Malayan Banking cash cheque No 170871 marked as exh 'P12' ('cheque') as a remuneration for assisting Nusantara in obtaining the approval of the Selangor State Exco in respect of Nusantara's application for a piece of state land comprised in a portion of Lot 4287, Seksyen Pekan Batu Caves, Mukim Selayang having an area of 209,632.5 square ft ('land').

[2] At the close of the prosecution's case before the trial court, the charge was amended and that amended charge against the respondent was worded in the Malay language as follows:

> Bahawa kamu pada 15hb Mac 1997, lebih kurang pukul 12.00 malam, di No. 2, Jalan Selaseh 4, Taman Selaseh, Batu Caves, dalam Daerah Gombak, di dalam Negeri Selangor Darul Ehsan, telah secara rasuah menerima untuk diri kamu suatu suapan, iaitu sekeping cek Malayan Banking Berhad nombor 170871, berjumlah RM1 juta, daripada Dato' Dr. Hanifah bin Nordin, *bekas* Pengerusi Eksekutif Syarikat Nusantara Network Sdn Bhd, sebagai upah kepada kamu kerana telah melakukan suatu perbuatan, iaitu membantu syarikat itu dalam permohonan tanah Kerajaan di sebahagian Lot 4287, Section 4, Pekan Batu Caves, Mukim Batu, Daerah Gombak, Selangor untuk mendapatkan kelulusan Majlis Mesyuarat Kerajaan Negeri Selangor, di mana permohonan itu telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri Selangor pada 4hb Oktober 1995, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 3(a)(i) Akta Pencegah Rasuah 1961 (Akta 57), yang boleh dihukum di bawah Seksyen yang sama.

[3] It must be stated that the underlined word 'bekas' was the only amendment made to the original charge on 31 October 2000 at the close of the prosecution's case. The prosecution called 28 witnesses. When the respondent's defence was called, the respondent elected to give his evidence under oath and he also called eight other witnesses.

[4] At the close of the defence case, the respondent was found guilty by the trial court and convicted as per the amended charge and sentenced to one year imprisonment, and fined RM10,000 in default six months' imprisonment and was also ordered to pay the penalty of RM1m to the Federal Government.

[5] The respondent appealed to the High Court against his conviction and sentence. The public prosecutor ('the appellant') filed a cross-appeal against sentence.

[6] Before the High Court, the respondent's appeal against his conviction and sentence was allowed. Accordingly, the High Court set aside the respondent's conviction and sentence as well as the penalty. The respondent was acquitted and discharged by the High Court and he was set free. The High Court also dismissed the cross-appeal by the appellant.

[7] Aggrieved, the appellant filed an appeal to this court.

THE PROSECUTION'S CASE

[8] On 15 March 1997 the respondent was the State Assemblyman for the constituency of Paya Jaras in Selangor and in that capacity he was also a member of the Selangor State Legislative Assembly. On that date, the respondent was not a member of the Selangor State Exco (the body, that approved land applications). But he was a member of the Land Committee for the district of Gombak as well as a member of the Development Committee for the district of Gombak.

[9] The respondent used to hold the position of an Exco member of the Selangor State Government and he was also, at one time, the speaker of the Selangor State Legislative Assembly.

[10] Nusantara was incorporated on 17 September 1994 with the object of developing any land situated in Selayang.

[11] SP1 purchased Nusantara as a shell company. On 31 October 1994, the shares of Nusantara were transferred to SP1 and Mohd Khalili bin Abdullah ('SP11') and both of them held one share each. There were four directors in Nusantara, namely:

(a) SP1;

(b) Abu Zarin bin Yaakob ('SP2');

(c) SP11; and

(d) Mohd Maslan (not called as a witness).

[12] And all these four directors of Nusantara were UMNO members.

[13] Nusantara was interested in applying for the land for the purpose of

developing the land into a commercial centre to be named as the 'Selayang Business Park' ('project'). The land was situated next to the district mosque in Batu Caves in the Gombak area. And on the land there were nine existing government quarters meant for officers working in the Gombak district land office.

[14] But Nusantara had no experience in developing the land and so Nusantara entered into a joint venture agreement with Syarikat Adiras Sdn Bhd ('Adiras') in order to develop the land. The directors of Adiras were Bill Chin Sooh Howe @ Chin Kok Howe ('SP10') ('Bill Chin'), Madam Ho Wan Jin (Bill Chin's wife) and Frankie Lee Kah Hoay ('SP6'). It was agreed between Nusantara and Adiras that Nusantara's responsibility was to get the land while Adiras's responsibility was to secure financing for the project. It was also agreed that Adiras was responsible for the management, administration and the marketing of the project. It was further agreed by virtue of article 10 of the joint venture agreement that 15% of the profits would go to Nusantara while the balance of the profits amounting to 85% would go to Adiras. And that any losses would be incurred and borne by Adiras solely.

[15] With the joint venture agreement in place, both Nusantara and Adiras then forwarded their joint application to the Gombak land office for the land supported by the relevant documents on 7 January 1995 as per exh 'P2'. Nusantara's application was signed by SP1.

[16] In January 1995, all the four directors of Nusantara together with two directors of Adiras, namely, SP6 and Bill Chin approached the respondent to seek his help in order to secure the land successfully. Towards this end they met the respondent several times. In his oral evidence, SP1 testified that the respondent in his capacity as the division head of the Selayang UMNO had *solicited* from Nusantara through Bill Chin a sum of RM1m for himself and another RM1m for Tan Sri Muhamad bin Muhamad Taib ('SP18') — the then Menteri Besar of Selangor.

[17] According to SP1, the four directors of Nusantara together with the two directors of Adiras met the respondent over dinner in a private room in the Chinese restaurant at the Equatorial Hotel sometime in March 1995. After dinner, according to SP1, Bill Chin asked them to leave him alone with the respondent in the private room. SP1 and the rest of them then left the private room. According to SP1, subsequently he saw Bill Chin and the respondent came out of the private room and SP1 saw Bill Chin escorted the respondent to the latter's motor car. After that Bill Chin approached SP1 and spoke to SP1 privately and Bill Chin told SP1 that the respondent wanted RM2m in order to

lend support to their application for the land. Bill Chin told SP1 that out of the sum of RM2m, RM1m was for the respondent and the balance RM1m was meant for SP18.

[18] According to SP1, he was shocked and disappointed with the respondent. SP1 least expected that the respondent as the head of the Selayang UMNO wanted money in exchange for helping them. SP1 completely lost respect for the respondent as a result of what had transpired. SP1 told Bill Chin that under the joint venture agreement the respondent's request fall within the portfolio of Adiras and not that of Nusantara.

[19] SP1 testified that a few days later, SP11 told SP1 that the respondent had enquired whether the respondent could be given 5% out of the profit from the project.

[20] SP1 testified that after Nusantara had terminated the joint venture agreement with Adiras, Bill Chin harassed not only SP1 but also SP2 as well as the respondent. According to SP1, Bill Chin sought for RM1.5m as settlement for wrongful termination and Bill Chin also sought for a sum of RM400,000 as his expenses. SP1 testified that the respondent asked SP1 to settle the matter out of court in regard to the 5% which Bill Chin had given to the respondent out of Bill Chin's 85% share from the project because the respondent did not want Bill Chin to disclose this fact in court.

[21] SP1 testified further and he said that the respondent obtained a copy of Nusantara's working paper pertaining to the land application and the respondent made some amendments to the working paper. Mohd Jamidan bin Abdullah ('SP8'), an Anti-Corruption Agency ('ACA') officer, testified for the prosecution. According to SP8 that on 29 March 1998, the ACA officers conducted a search in the respondent's house and the following documents connected with Nusantara's land application were seized and listed in the search list as per exh 'P44':

(a) a letter from SP1 to the respondent requesting the respondent's assistance on the matter marked as exh 'P7';

(b) a letter from SP11 to the respondent requesting the latter's assistance on the matter marked as exh 'P28'; and

(c) a yellow file containing documents related to Nusantara's land application marked as exh 'P24'.

[22] Yahaya bin Abdullah ('SP12'), a district officer with the Gombak land office processed Nusantara's application. After processing, SP12 transmitted Nusantara's application to the Administrator/Director of Lands & Mines,

Selangor. In due course, Nusantara's application was forwarded to Zulkepli bin Ahmad ('SP15') by the Administrator/Director of Lands & Mines, Selangor.

[23] SP15 testified that the respondent asked him to refer Nusantara's application to SP18 — the then Menteri Besar of Selangor, so that it could be tabled at the Selangor State Exco meeting.

[24] On 4 October 1995, the Selangor State Exco approved Nusantara's land application. The approval was granted subject to two conditions. Firstly, to pay RM5,659,736 as the land premium. Secondly, to shift nine existing government bungalows to another location.

[25] The letter of approval can be seen in exh 'P8' and it was dated 4 November 1995.

[26] Initially, Adiras was unable to secure a bank loan to pay for the land premium which was supposed to be paid within three months from the date of the letter of approval. Nusantara succeeded in obtaining three extensions of three months each to pay the land premium. Finally, Adiras succeeded in securing a loan from MBSB to pay for the land premium as well as to finance the project.

[27] But Nusantara decided to terminate the joint venture agreement with Adiras based on three reasons as reflected in its letter dated 13 August 1996 signed by SP2 and SP11. And the three reasons were as follows:

(a) misrepresentation that Adiras is a developer company and Bill Chin is a developer;

(b) the failure on the part of Bill Chin to obtain financing for the project; and

(c) the failure on the part of Adiras to obtain a guarantee and indemnity for the proposed charge of the land to the bank.

[28] On 4 October 1996, Nusantara entered into a fresh joint venture agreement with Penaga Ventures Sdn Bhd ('Penaga') and Edward Lee Hock Soon ('SP9'), a shareholder of Penaga, as reflected in exh 'P10 (1–10)'. Penaga and SP9 took over 75% of Nusantara's shares. The director who represented SP9 in Nusantara was SP6. It must be stated that SP6 was a former director of Adiras.

[29] SP11 testified that it was the respondent who personally handed over to SP11 the letter of approval of Nusantara's application dated 4 November 1995 as per exh 'P8'.

[30] SP18 testified that the application for the land advanced by Nusantara succeeded on its own merits.

[31] SP1 testified that after Nusantara had paid the land premium by way of a loan taken by Penaga, he would often meet the respondent. On 2 January 1997 at one of those meetings, the respondent asked SP1 to stay back after an UMNO division meeting in Taman Selayang. And according to SP1, in the respondent's office, the respondent asked SP1 for RM2m.

[32] SP1 testified that on the night of 15 March 1997, approximately one year and five months after Nusantara's application for the land was approved by the Selangor State Exco, SP1 went to the respondent's house and met the respondent. According to SP1, in the study of the respondent's house, he handed over to the respondent an envelope containing the cheque for RM1m together with a covering letter marked as exh 'P13'. According to SP1, the cheque was crossed and had the word 'cash' written in the space allocated for the name of the payee.

[33] According to SP1, the RM1m cheque was a political donation by Nusantara to the Selayang UMNO division of which the respondent was the head. SP1 testified that it was a contribution towards the cost of the construction of a new building to house Selayang UMNO division office. And it was because of that that SP1 said that he made sure that the cheque was crossed so that the respondent could not take the money for himself.

[34] On 25 March 1998, slightly more than a year after SP1 had given the cheque to the respondent at the respondent's house, SP6 sent a letter of complaint dated 25 March 1998 (exh 'D16') to the then Deputy Prime Minister complaining about the failure of the respondent to issue a receipt for the RM1m cheque and the alleged embesslement by the respondent of the RM1m contribution to the Selayang UMNO division. In that letter of complaint (exh 'D16'), SP6 also stated that although RM1m had been given to the respondent a year earlier there was still no sign of the construction of the Selayang UMNO building a year later. The then Deputy Prime Minister who was tasked with the responsibility of overseeing the ACA was instrumental in the arrest and subsequent prosecution of the respondent in court. SP1 also tesfitied that he too personally wrote a letter of complaint dated 3 April 1998 (exh 'D15') to the then Deputy Prime Minister about the respondent.

THE RESPONDENT'S DEFENCE

[35] In his defence taken under oath, the respondent testified as follows. He admitted that he met Bill Chin, SP1 and the others on 20 May 1995 in the Equatorial Hotel and there he said that they asked him for assistance regarding

their plan to apply for the land in order to build the project. He said that they approached him because he was the State Assemblyman for Paya Jaras in the Gombak district and the land was situated in the Gombak district and he said that they were under the impression that he could assist them to get the land. However, he said that he knew he did not have the power to approve any application for the land because he was only a State Assemblyman. Be that as it may, he told them that they had to put in their application for the land first and he could assist them in forwarding their application and relaying the information to the Menteri Besar of Selangor. In his defence taken under oath, the respondent testified as follows. He admitted that he met Bill Chin, SP1 and the others on 20 May 1995 in the Equatorial Hotel and there he said that they asked him for assistance regarding their plan to apply for the land in order to build the project. He said that they approached him because he was the State Assemblyman for Paya Jaras in the Gombak district and the land was situated in the Gombak district and he said that they were under the impression that he could assist them to get the land. However, he said that he knew he did not have the power to approve any application for the land because he was only a State Assemblyman. Be that as it may, he told them that they had to put in their application for the land first and he could assist them in forwarding their application and relaying the information to the Menteri Besar of Selangor.

[36] He said that he told them that he would assist them. He said that he never asked them for anything. But he said that Bill Chin told him that Bill Chin will give whosoever who could assist in getting the application for the land approved a commission of RM2m. He said that he was under the impression that what Bill Chin had said was intended for him. However, he said that he did not respond to Bill Chin's statement. He was categorical when he said that he had never asked Bill Chin for RM2m in order to assist them in obtaining the approval for Nusantara's land application. He categorically denied that he had asked Bill Chin for RM1m for himself and another RM1m for the then Menteri Besar of Selangor.

[37] He also denied that whilst he was at the Equatorial Hotel with Bill Chin, SP1 and the others, there was a time when Bill Chin asked SP1 and the others to leave him alone with Bill Chin in one room and that it was during this time that he asked Bill Chin for RM1m for himself and another RM1m for the then Menteri Besar of Selangor. It is germane to mention that this denial by the respondent was corroborated by Bill Chin himself.

[38] He further testified and he denied that after attending the UMNO Selayang division committee meeting one particular night, he had a meeting with SP1 in his office at UMNO Selayang and he denied that at this meeting he had demanded for RM2m from SP1 — the breakdown being RM1m for himself and the other RM1m for the then Menteri Besar of Selangor. He

testified that there could not have been a meeting between SP1 and himself that night because SP1 had left early that night after attending the UMNO Selayang division committee meeting as SP1 wanted to take a flight overseas. Again, it is ideal to state that this denial of the respondent received the support and was corroborated by the evidence of Azmi bin Jusoh ('SD2').

[39] In his testimony, the respondent admitted that he has asked SP18, the then Menteri Besar of Selangor, to assist Nusantara's application for the land. According to the respondent, he had two meetings with SP18 in connection with Nusantara's land application. The first meeting was in his capacity as the State Assemblyman for Paya Jaras. In that capacity he said that he conveyed to SP18 his support for Nusantara's application for the land in order for Nusantara to develop the project. The second meeting was in his capacity as the division head for UMNO Selayang. In that capacity he had to explain to SP18 that one of Nusantara's board of directors, namely SP1, is an UMNO leader. He testified that he thought that it was necessary to make that kind of explanation to SP18 because he felt that SP18 as the Menteri Besar of Selangor ought to know the background of SP1 as the applicant bearing in mind that he knew that SP1 was close to the then Deputy Prime Minister. According to the respondent as the State Assemblyman for Paya Jaras he knew that SP1 was a controversial individual in UMNO politics. He also said that he knew that SP1 had twice attempted to contest in the UMNO Supreme Council elections but SP1's nominations did not receive the blessings of the Selangor UMNO Liaison Committee.

[40] The respondent testified further and he said that although Bill Chin had offered him a commission of RM2m if he could assist Nusantara's application for land, yet it did not cross his mind that what he was doing was something wrong in that he merely supported Nusantara's application for land when he met the then Menteri Besar of Selangor ('SP18') twice in order to express his full fledged support for Nusantara's application. He gave his reasons for his undying support for Nusantara's application. Firstly, he was no longer a member of the Selangor State Exco with effect from 25 April 1995. Secondly, he was not involved in the approval process of Nusantara's application. Thirdly, he knew that only the Selangor State Exco who had the power to approve Nusantara's application and for that matter all other applications for land. Fourthly, on 20 May 1995 when he was approached by Bill Chin, SP1 and the others at the Equatorial Hotel to assist Nusantara's application, he was no longer a member of the State Exco.

[41] He testified that he did not meet nor could he have met SP1 concerning Nusantara's application on 29 March 1995 when he was still an Exco member because on that date he was busy as he hosted his Hari Raya open house. He produced photographs which were taken on his Hari Raya open house day to

corroborate his version. The photographs clearly showed that SP1, SP18 and he himself were present during the joyous occasion. His witness by the name of Aminuddin bin Mohd Yusoff ('SD4') who took the photographs corroborated his evidence. Azizah bt Sharif ('SP17') also corroborated his evidence. The learned High Court judge on this issue held that 'there was an irresistible inference that SP1's evidence on this issue together with SP1's electronic diary were totally made up for the purpose of incriminating him'.

[42] In due course, the Selangor State Exco approved Nusantara's land application. But the respondent denied that he was the person who had given the letter of approval to SP11 because the letter of approval was addressed to Nusantara and the respondent was not the director of Nusantara.

[43] In regard to the cheque in exh 'P12', the respondent admitted that SP1 gave him that cheque at his house at approximately past midnight on 15 March 1997 as stated in the amended charge. But the respondent denied that the cheque was given to him in an envelope together with a letter marked as exh 'P13'. The respondent also denied that the cheque was given to him in the study of his house. According to the respondent, SP1 gave him the cheque at the gate of his house. The respondent elaborated further and he testified that what had transpired was that SP1 had earlier asked through the respondent's secretary ('SP17') to see the respondent that night and the respondent agreed. But because the respondent was very busy that night he had entirely forgotten about the matter. When SP1 pressed the door bell of his house, the respondent went to the front gate which was locked at that time. It was at the front gate that SP1 gave the respondent the cheque. And the gate was still locked. The respondent did not invite SP1 inside the respondent's house because SP1 was in a hurry. According to the respondent, SP1 told the respondent that it was a cash cheque but crossed. And SP1 did not say the cheque was for whom. The respondent could not see the cheque clearly because it was dark. What came across the respondent's mind at that time was that it was a RM1.2m cheque being compensation for Bill Chin. According to the respondent the whole episode pertaining to the giving of the cheque by SP1 to the respondent at the respondent's house that night and the respondent receiving the cheque ('the cheque episode') lasted for about one to two minutes only. Under cross-examination the respondent denied that the cheque was given to him together with the letter marked as exh 'P13'.

[44] The respondent continued in his testimony and he said that he saw the cheque clearly when he took it inside his house. He testified that it was a crossed cash cheque just like what was told to him by SP1. He knew right away that he could not cash the cheque although it was a cash cheque because it was also crossed. He also knew that the crossed cheque had to be banked into an

account. And he also knew that once the crossed cheque was banked in, it was easy to trace the person who had received the money and that would be the respondent.

[45] The respondent testified further and he said that when SP1 gave him the crossed cheque he thought that the crossed cheque was meant for Bill Chin. The respondent advanced a reason for this supposition. He said that Bill Chin had complained to him earlier in the day that SP1 had wrongfully terminated the joint venture agreement between Adiras and Nusantara. And that Bill Chin had claimed a sum of RM2m from SP1 as compensation for the wrongful termination. According to the respondent, Bill Chin had approached him for assistance to get SP1 to pay Bill Chin the sum of RM2m and Bill Chin told the respondent to keep the RM1m which was given to the respondent by SP1 until Bill Chin was able to get the sum of RM2m from SP1. The evidence on this issue was supported by Gurubachan Singh Johal s/o Amar Singh ('SD6').

[46] According to the respondent, one or two weeks before the cheque episode, he had negotiated compensation in the sum of RM2m with SP1 for the benefit of Bill Chin and SP1 agreed and had offered to pay RM1.2m to Bill Chin through the respondent. And since SP1's evidence on this issue corroborated what was said by the respondent, the respondent thought that the cheque was given to him as compensation for Bill Chin. That being the background behind the cheque episode, the respondent banked in the crossed cheque on 17 March 1997 into his personal account. And on 17 March 1997, the respondent tried to contact SP1 for the purpose of asking SP1 the reason for giving the crossed cheque. The respondent also testified that he did not contact SP1 on 16 March 1997 because that day was a weekend.

[47] The respondent testified that he was informed by SP1's office that SP1 had gone overseas. On SP1's return, the respondent tried in vain to contact SP1 in order to obtain an answer in regard to the crossed cheque. Meanwhile SP1 lost in the UMNO Supreme Council elections and since that defeat, the respondent found it difficult to contact SP1. Finally, about one or two months after the cheque episode the respondent managed to speak to SP1 over the telephone and the respondent enquired as to the purpose of giving the crossed cheque. According to the respondent, SP1 told him that that was all the money which SP1 had and it was up to the respondent to make whatever payment that the respondent wished.

[48] The respondent testified that the cheque was not for RM1.2m which would have been the amount if it was meant as compensation for Bill Chin. It dawned on the respondent that the cheque was meant for him being payment of his commission payable by Nusantara for assisting Nusantara in its land application. The respondent recalled to mind what Bill Chin had said that

Nusantara would pay commission of RM2m to any person who could assist in securing the approval for Nusantara's land application. But at the same time, the respondent was unsure because the amount written on the cheque was not RM2m as was said by Bill Chin.

[49] It also dawned on the respondent that the cheque could be the compensation meant for SP11 and Hussin bin Mohd Johari ('SP16') who had set up Laluan Angsana Sdn Bhd after SP11's directorship in Nusantara was terminated because both of them had complained to the respondent that their services were terminated by SP1 without any compensation and they had approached the respondent for help. According to the respondent, he had spoken to SP1 to ask for compensation on their behalf. He said that he had used RM230,000 taken from the RM1m and gave it to SP11 as compensation. And although SP11 had offered some shares to him in return for helping SP11, he did not accept SP11's offer because he had given SP11 that sum of money without any conditions attached.

[50] The respondent testified that on 23 March 1998 he received a telephone call from Dato' Abdul Rahim bin Osman ('SP24') who asked for permission to see him. The respondent agreed. On 24 March 1998, the respondent met SP24 at the Templer Golf Club. There SP24 showed to the respondent a photostat copy of the cheque and SP24 told the respondent that SP1 had requested that the respondent to withdraw from contesting the post of division head of UMNO Selayang otherwise SP1 would report about the cheque to the ACA bearing in mind that the cheque had been banked into the respondent's account. According to the respondent, he told SP24 to tell SP1 to 'go to hell'.

[51] The respondent testified that he did not give the cheque to Bill Chin because he was unsure as to whether it was really intended as compensation for him because of the amount stated in the cheque. The respondent thought that the cheque was intended by SP1 as compensation to SP11, a director of Nusantara, who had been terminated by SP1 and also as a commission to himself. The respondent testified that he felt he was entitled to keep the cheque because he had assisted Nusantara in securing the land and that he had used part of the proceeds from the cheque to compensate SP11. He said that he did not inform SP11 that the sum of RM230,000 which he gave to SP11 was compensation from SP1 because he did not want SP11 to ask for more.

[52] The respondent explained further. He said that the cheque was given to him by SP1 on behalf of Nusantara and that SP1 had expressly told him over the telephone that he could do whatever he wanted to do with the money. He testified that he felt strongly that he had not done anything immoral or wrong as far as the law was concerned in receiving the cheque. It must be borne in mind that the evidence of the respondent on this point was corroborated by

SP18. In his evidence, SP18 had testified that an ordinary State Assemblyman could receive commission for lobbying the Menteri Besar for approval of Nusantara's application.

[53] And when the respondent finally met SP1, SP1 did not tell him that the cheque was meant to be a contribution to UMNO Selayang. Neither did SP1 ask him whether he had banked the cheque into the account of UMNO Selayang nor did SP1 ask him for a receipt for the cheque.

[54] It was for these reasons that the respondent said that he had denied at the UMNO delegates' meeting that the RM1m was given to him as a political donation for UMNO and he had stated that the RM1m was given to him in connection with a business deal. It was for these reasons too that the respondent had stated in his letter marked as exh 'D55' that the cheque had been given to him because of his business dealings. The respondent further explained that he did not state in the letter marked as exh 'D55' that the RM1m was intended to be payment for compensation to SP11 or payment of commission to himself or payment of compensation to Bill Chin because the issue that was raised at the UMNO delegates meeting at that time was whether the RM1m was a political donation for UMNO. According to the respondent the term 'business dealings' encompassed the payment of compensation, commission and damages.

[55] And according to the respondent, on 25 March 1998 onwards he had gone into hiding as he had information that the ACA was planning to arrest him. He advanced the sole reason for doing so and that was that he wanted to make sure that he could contest in the UMNO Selayang division head's election on 29 March 1998.

[56] The respondent also called eight other witnesses to support his defence, namely:

(a) Hj Azmi bin Jusoh ('SD2');

(b) Meor Arif bin Ahmad ('SD3');

(c) Aminuddin bin Mohd Yusof ('SD4');

(d) Faridah bt Hitam ('SD5');

(e) Gurubachan Singh Johal a/l Amar Singh ('SD6');

(f) ASP Abd Wahab bin Harun ('SD7');

(g) Rizuan bin Abd Hamid ('SD8'); and

(h) Rahiman bin Selamat ('SD9').

ANALYSIS

[57] The respondent was charged under s 3(a)(i) of the PCA and that section reads as follows (the relevant parts in the context of the amended charge):

> 3 Punishment of corruption.
>
> Any person who shall by himself or by or in conjunction with any other person —
>
> (a) corruptly solicit or receive or agree to receive for himself or for any other person; any gratification as an inducement to or reward for, or otherwise on account of —
>
> (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place;
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[58] The ingredients for an offence under s 3(a)(i) of the PCA, in the context of the amended charge against the respondent, are as follows:

(a) that the respondent received for himself a gratification of RM1m from SP1;

(b) that the gratification was received corruptly by the respondent;

(c) that the respondent received the gratification as a reward for himself for assisting Nusantara to obtain the approval of the Selangor State Exco for Nusantara's application for the land; and

(d) that on 4 October 1995, the Selangor State Exco approved Nusantara's application for the land.

[59] The word 'corruptly' is not defined in the PCA. Shepherd J in *Lim Kheng Kooi & Anor v Reg* [1957] MLJ 199, a case that was decided under the Prevention of Corruption Ordinance 1950, quoted with approval the definition of the word 'corruptly' from the case of *Bradford Election Petition* 19 LT 723 (see *Lim Kheng Kooi & Anor v Reg* at p 205):

> But if the money is given after the man has voted, you must show that that was done corruptly. Now, what is the exact meaning of that word 'corruptly'. It is difficult to tell; but I am satisfied it means a thing done with an evil mind — done with an evil intention; and except there be an evil mind or an evil intention accompanying the act it is not corruptly done. And thus when the word 'corruptly' is used it means an

act done by a man knowing that he is doing what is wrong, and doing so with evil feelings and evil intentions. I think it may be safely said that that is the meaning of the word 'corruptly'.

[60] Now, whether a gratification is being received corruptly is purely a question of intention. To a question whether the receipt was corrupt?, Shankar J in *Public Prosecutor v You Kong Lai* [1985] 1 MLJ 298 at p 301 answered it in this way: 'Yes, since its avowed purpose was for bribery.'

[61] Edgar Joseph Jr J (later SCJ) in *Choong Oi Choo v Public Prosecutor and another case* [1986] 2 CLJ 231when faced with the question of whether a bag of fruits containing five apples and six oranges given by the accused to the complainant's wife at the complainant's house when the complainant was not at home, was given corruptly or innocently held that the fruits were not offered with a corrupt intention since they might well be intended for the complainant's children (as the accused had said all along). His Lordship also held that it was a form of socially accepted conduct even though the complainant perceived it as an inducement. At p 240, His Lordship had this to say:

> 46 We recognise a corrupt gift by examining its purpose. It is the intended function of a gift which determines whether it is corrupt or innocent. This is the reason why what may be given as a bribe may be accepted as an innocent present and vice versa: *Regina v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118.

[62] According to the case of *Public Prosecutor v Mohamed Ali bin Mohamed Amin & Anor* [1979] 2 MLJ 57, it is solely a question of fact to determine whether or not an acceptance of a gratification amounts to a 'corrupt' acceptance punishable under the PCA. Everything falls to be decided by looking at the proved facts and the circumstances of the case.

[63] Raja Azlan Shah FJ (as His Royal Highness then was) in *Public Prosecutor v Datuk Hj Harun bin Hj Idris (No 2)* [1977] 1 MLJ 15 at p 22 defined the meaning of the word 'corrupt' in this way:

> 'Corrupt' means 'doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions.' (see *Lim Kheng Kooi v Reg* [1957] MLJ 199); 'purposely doing an act which the law forbids' (see *R v Smith* [1960] 1 All ER 256).
>
> 'Corrupt' is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the ambit of the section. The real point is whether there is soliciting a political donation with a corrupt intention.

[64] According to His Royal Highness in *Public Prosecutor v Datuk Hj Harun bin Hj Idris (No 2)*, even the manner of payment should be taken into consideration (see p 23 of the report):

> The manner in which the payments were made is a relevant consideration in the present case. It is in evidence that the bank was asked to make them in cash. Smorthwaite said that he asked Peter Lim to find out how such payment should be made, and his answer was in cash, no receipt. That is substantiated by the evidence of payments in cash. The bank could, and it is very much in their power, make the payment by way of cheque, or for that matter in one lump sum in cash. But they were coerced to make it in cash, and strangely enough, in two payments. This strange behaviour necessitated the bank in opening the new building — property suspense account for their accounting purposes.
>
> Then, the 'request' for the so-called donation. That is another telling point against the accused. In ordinary circumstances, the presentation of a donation, be it by way of cheque or otherwise, is preceded by certain formalities, for example, a representative of the donor firm would personally hand it to the donee at a proper place and in the presence of witnesses; not in some 'back alley'.

[65] Mohamed Azmi J (later SCJ) in *Ahmad Shah bin Hashim v Public Prosecutor* [1980] 1 MLJ 77, at p 80 also considered the manner in which the gratification was to be paid as a crucial factor to infer corrupt intention on the part of the wrong doer: '… the facts that the soliciting and subsequent agreement to accept for himself the 1% commission were done corruptly are supported by the manner in which the gratification was to be paid.'

[66] The facts in *Public Prosecutor v Datuk Hj Harun bin Hj Idris (No 2)* are different from the present appeal at hand. There payment was by cash and no receipt would be issued. Here, the payment was not by cash, it was by cash cheque which was crossed.

[67] Whoever deposits the cash cheque which was crossed could easily be identified. Here, when the respondent deposited the cash cheque which was crossed, his identity would be known to the whole world at large, so to speak. It must be borne in mind that that amount was quite large. Yet, there was no evidence that the respondent protested that the cash cheque was crossed. So the transaction can be termed as an open transaction. And unlike *Datuk Harun*'s case, in our appeal the banking transaction itself can be considered as a receipt bearing in mind that there would be confirmation in the bank statement that RM1m was banked into the respondent's account. Thus, pure and simple, it was an open transaction.

[68] Again, in *Datuk Harun*'s case, cash was received on two occasions, once at the airport and the other in a safety box in the bank and it was described as 'back alley' payments by His Royal Highness. Whereas here in the appeal

before us, the payment was made openly at the house of the respondent. In fact, there were two versions. The prosecution said that payment was made inside the house whereas the defence said that payment was made outside the house. The amended charge against the respondent showed that the cheque was received at 12 midnight on 15 March 1997 at the respondent's house without specifying the exact location.

[69] And according to the prosecution's witness particularly the evidence of SP1, exh 'P13' (the purported cover letter to the cheque) was also given to the respondent. Indeed if exh 'P13' really existed on 15 March 1997, it would be contrary to any finding of 'corruptly' because exh 'P13' attempts to make it an open transaction. We have more to say about exh 'P13' in the later part of this judgment.

[70] And even if we were to accept the contention of the prosecution that a circular resolution dated 14 March 1997 as per exh 'P21' existed authorising the payment to the respondent, that circular resolution reflects an open transaction and not a 'back alley' sort of transaction. Again, in *Datuk Harun's* case, the accused there behaved surreptitiously and the bank too kept the money surreptitiously in that it kept the money in a safety box rather than in any account.

[71] It is our considered view that the prosecution in *Datuk Harun*'s case need not go at length to show the 'dark circumstances' of the payments of the gratification because the ingredient of 'corruptly' in that case is easily proven by the fact that Datuk Harun sat in the Exco that approved the relevant land application of the bank and he did not declare his interest that he was receiving RM250,000 from the bank, be it for himself or for UMNO, in relation to such approval. It becomes corrupt simply because the act itself is offensive as it goes against the grain of s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 (*Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276 (FC); *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230 (FC); and *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245).

[72] In sharp contrast, the respondent in this appeal was not even an Exco member at the material time and so his position cannot be equated like the accused in *Datuk Harun*'s case.

[73] It is our judgment that to prove 'corruptly' in s 3(a)(i) of the PCA, the prosecution must show that the purpose of the gratification was an unlawful one.

[74] Here, since the amended charge in s 3(a)(i) of the PCA did not involve

'any member, officer, or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the public body is concerned' as exemplified in s 3(a)(ii) of the PCA, it made it more difficult for the prosecution to factually prove the element of 'corruptly'.

[75] Indeed the learned High Court judge realised that it was important to bear in mind that the respondent was not charged under s 3(a)(ii) of the PCA for corruptly accepting the cheque to approve Nusantara's application because the respondent was not a member of a public body, to wit, a member of the State Exco. It must be emphasised that, at the material time, the respondent was only an ordinary State Assemblyman.

[76] The learned High Court judge was also of the view that the trial court had to find credible and cogent evidence to show that the acceptance of the cheque by the respondent was against the law in order to render the receipt of the cheque a corrupt receipt.

[77] At this juncture, it is ideal to highlight the submissions of the parties under different sub-headings.

THE AMENDED CHARGE

[78] The word 'bekas' was the only word that was added to the amended charge. And the amended charge carried the following sentence, 'telah secara rasuah menerima untuk diri kamu suatu suapan' and the translation reads as follows, 'did corruptly receive for yourself a gratification, to wit'. The crucial words in the amended charge must be 'secara rasuah' (corruptly) and without these words there would be no offence.

[79] In any corruption trial, the word 'gratification' is considered a bad word. A distasteful word. The 'New Oxford English-Malay Dictionary' at p 351 defines the word 'gratifying' as 'memuaskan hati'. While 'Oxford Fajar Advanced Learner's English-Malay Dictionary by AS Hornby' defines the word 'gratification' at p 805 to mean 'gratifying or being gratified; state of being pleased or satisfied; puas hati/gembira atau dibuat menjadi puas hati/gembira; keadaan gembira atau puas hati, the gratification of knowing one's plans have succeded, rasa puas hati mengetahui bahawa rancangan telah berjaya, sexual gratification, kepuasan seks, thing that gives one pleasure or satisfaction: benda yang memberi kegembiraan atau kepuasan hati kepada, one of the few gratifications of an otherwise boring job: salah satu daripada kepuasan dari pekerjaan yang jika tidak membosankan'. It must be noted that these two dictionaries do not state that the word 'gratification' to mean 'bribe'.

[80] Dato' Sri Dr Muhammad Shafee Abdullah, learned defence counsel for the respondent, argued that the correct Malay translation of the word 'gratification' should be 'upah' and not 'suapan' as used by the prosecution. He submitted that the prosecution labelled the word 'suapan' to mean 'under counter'.

[81] The Malay language dictionary entitled 'Kamus Lengkap, Penyunting Drs Awang Sudjai Hairul, MA (Linguistics), Yusoff Khan, BA (Hons (London)' at p 1061 explained the word 'suap' relevant to the present appeal to mean:

> 3 (memberi rasuah, menyogok) Orang yang jujur tidak boleh disuap.

[82] On the same page of the same dictionary, the word 'suapan' is defined as 'bribe'.

[83] And at p 1217 of the same dictionary, the word 'upah' is described as 'fee, wages, payment for work or service'.

[84] In an unabridged 'Malay-English Dictionary by R.O. Winstedt at page 339' the word 'suap' is defined as 'a bribe', 'take bribes'. And at the same page, the word 'menyuapi' is defined as 'bribe (a person)'.

[85] At p 384 of *Winstedt's dictionary*, the word 'upah' refers to 'payment for work or service'.

[86] On the strength of these dictionaries, 'suapan' would mean gratification and not 'upah' as suggested by learned defence counsel. In our judgment, it is appropriate and correct to use the word 'suapan' to mean 'gratification'.

[87] Section 2 of the PCA defines the word 'gratification' in many ways. Relevant to the amended charge and to the defence of the respondent is the meaning of the word 'gratification' to include 'commission' (see s 2(d) of the PCA). For the transaction to be an offence within the meaning of s 3(a)(i) of the PCA, the purpose for which the money was given to the respondent should be identified. The RM1m must be proved by the prosecution to be for the respondent alone and for the sole purpose of being his corrupt reward for the favour done.

[88] Dato' Abdul Razak bin Musa, the senior deputy public prosecutor, argued that the respondent had received the cheque (exh 'P12') for RM1m and the respondent had admitted receiving the cheque and the respondent too had deposited the cheque into his own account corruptly. But while the amended

charge states that the cheque was a gratification ('suapan' and not 'upah') to the respondent as a reward for a favour shown, the prosecution produced witnesses like SP1 who clearly suggested that the RM1m was never meant for the respondent but as a donation to UMNO. If that was the case, there was no prima facie case for the respondent to answer as per the amended charge and the respondent should have been acquitted and discharged by the trial court without his defence being called.

[89] It was not only SP1 who gave that kind of evidence. SP3, SP4, SP6, SP8 and Bill Chin also gave the same kind of evidence. To demonstrate, the following brief excerpts from their evidence would suffice:

(a) SP1 testified in cross-examination at p 40 of the appeal record at *jilid* 2A as follows:

> Yes it is for UMNO Selayang dan hasrat saya untuk duit pelbagai untuk pembinaan bangunan itu. Hasrat Nusantara ialah untuk duit itu pergi kepada UMNO Bahagian Selayang. What was discussed (between me and) the accused is my hasrat that the money goes to the UMNO Selayang Building.

Hasrat untuk UMNO Selayang dan bukan kepada individu — ini hasrat saya dan juga Nusantara.

(b) in her examination-in-chief, Lhow Dai Ying ('Belinda') ('SP3') testified at p 101 of the appeal record at *jilid* 2A as follows:

> I was later told that this cheque was for UMNO contribution by Lee Hock Soon and Lee Kah Hoay sometime later, cannot remember when.

(c) in her examination-in-chief, Zarina Abd Aziz ('SP4') testified at p 111 of the appeal record at *jilid* 2A to this effect:

> Belinda (SP3) kata, 'Ini adalah contribution untuk UMNO' dan beliau beri resolution kepada saya kepilkan IDD20 dengan resolution dan dalam cek butt saya tulis dalam kurungan contribution to UMNO. Kalau syarikat keluarkan duit, syarikat akan keluarkan resolution, saya lihat ada 1 (satu) juta dan contribution to UMNO dalam resolution itu.

(d) Lee Kah Hoay ('Frankie') ('SP6') testified in examination-in-chief at p 129 of the appeal record at *jilid* 2A as follows:

> Ini circular resolution. Saya tandatangan di sebelah kanan di bawah dan yang di kiri ditandatangan oleh Fan Seng Chuan. Saya faham dan SP6 baca resolution tersebut di Mahkamah. la bermakna 1 (satu) juta tersebut telah disetujui diberi kepada UMNO Bahagian Selayang.

(e) under cross-examination, Lee Kah Hoay (Frankie) (SP6) testified at p 137 of the appeal record at *jilid* 2A as follows:

> SP1 mencadang supaya 1 (satu) juta dibayar kepada UMNO Bahagian Selayang dan bukan kepada individu dan kami terpaksa bersetuju.

(f) Fan Seng Chuan, Henry ('SP8') testified under examination-in- chief, at p 170 of the appeal record at *jilid* 2A as follows:

> The 1 (one) million is meant for UMNO Bahagian Selayang. I was told that it was meant for UMNO Bahagian Selayang by Frankie (SP6) and as such I sign this resolution.

(g) Bill Chin under examination-in-chief, at p 194 of the appeal record at *jilid* 2B testified as follows:

> I told Abu Zarin (SP2) that it was for UMNO fund.

(h) and finally, Bill Chin testified as follows (see p 210 of the appeal record at *jilid* 2B):

> The contribution at that time Nusantara is interested to sell the company to Adiras and the money I mentioned here is the buying over of the project, i.e the new company would have to pay the 2 (two) million as UMNO's contribution.

[90] All these witnesses testified that the RM1m was a political donation to UMNO Selayang for their building fund. None of these witnesses said that the RM1m was paid to the respondent and for the respondent as a gratification ('suapan' and not 'upah'). Their versions seem to suggest that the respondent was a mere courier to receive the RM1m for UMNO Selayang.

[91] What this amounts to is simply this. That the giver (SP1) of the RM1m had never bribed the respondent.

[92] Now, for an offence to be committed under s 3(a)(i) of the PCA, the gratification has to be 'bribe money' and nothing else. It must be borne in mind that the respondent was charged for receiving the gratification.

[93] Mimi Kamariah Majid in her book 'Criminal Procedure In Malaysia', (3rd Ed), defined a criminal 'charge' in these erudite terms (see p 369):

> The charge is the first step in the criminal prosecution process of an offence. It is a definite allegation. When a person is said to be 'charged with an offence', he is in fact called to appear before a magistrate or a judge and informed of the charge or complaint against him. A charge is important to an offender because it evolves

several rights for the offender and safeguards against injustice. The charge is also a notice to the offender of the matter with which he is accused of. For this reason it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself. The charge is an information to the court which is to try the accused of the matters to which evidence is to be directed (*Mohamed Humayoon Shah* [1874] 21 W.R. Co. 72 82).

[94] In a criminal trial, the charge is an important piece of document. It sets out the offence wherein the accused is alleged to have committed the offence. The purpose of a charge is to inform the accused of the offence which he is alleged to have committed so that he can adequately prepare his defence. In *Lim Beh & Ors v Opium Farmer* [1842] 3 Ky 10 at p 12, it was held that:

… if there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as he best may.

[95] It is the duty of the prosecution to determine the most appropriate charge based on the particular facts and circumstances of the case.

[96] The significance of drafting an appropriate charge was emphasised by Masodkar J in *Ramkrishna Sawalaram Redkar v State of Maharashtra* [1980] Cri LJ 254. There His Lordship had this to say (see pp 254–255):

Thus, the whole matter of the foundation of the prosecution with regard to the present trial has proceeded on erroneous basis resulting in obvious miscarriage of justice both to the prosecution as well as to the accused. No sufficient attention by all concerned appears to have been bestowed with regard to the framing of the proper charge and tendering evidence in its support. In criminal trial the charge is the foundation of the accusation and every care must be taken to see that it is not only properly framed but evidence is only tendered with respect to the matters put in the charge and not the other matters. If we were to apply these principles, the conviction obviously cannot be sustained, for the items at exhs 'A'–'L' are not expressly the part of the fourth count of the charge.

[97] The cross-examination of the prosecution's witnesses brought into sharp focus questions pertaining to the purpose RM1m was given to the respondent. We can do no better than to list down these nagging questions:

(a) was RM1m meant for the respondent?; or

(b) was it meant for a third party in the person of SP18 — the former Menteri Besar of Selangor as suggested by SP1?; or

(c) was it a political donation to the building fund of UMNO Selayang?; or

(d) was it an innocent commission payment to the respondent in a normal brokerage transaction?; or

(e) was it meant as part of the payment to satisfy Bill Chin's demand of RM2m compensation?; or

(f) was the money meant for compensation to the two sacked directors?; or

(g) could the objective of the money being given be a combination of all the reasons given above?

[98] We cannot sweep under the carpet, so to speak, the following evidence that surfaced before the trial court. There is evidence that the respondent thought that the money was meant for Bill Chin. It must be borne in mind that the joint venture agreement between Nusantara and Adiras had been terminated and Bill Chin had asked for RM2m compensation but SP1 agreed to pay RM1.2m to Bill Chin. There is also evidence of Bill Chin's dissatisfaction in regard to the termination of the joint venture agreement and this by itself lends credence that the RM1m was for compensation to Bill Chin. In his evidence, Bill Chin confirmed that SP1 was agreeable to pay him RM1.5m or RM2m. Bill Chin had a draft agreement that made reference to RM1.5m. Bill Chin also testified that after he spoke to the respondent over the telephone he never saw the respondent again. This fact is certainly important as it corroborates the fact that the respondent thought that the money was meant for Bill Chin and that the respondent merely acted as a mediator.

[99] It is germane to mention that both SP6 and Edward Lee ('SP9') testified before the trial court that at some stages of the relevant period they did not trust SP1 in relation to the RM1m payment. These two witnesses even thought that SP1 could be using the sum of RM1m for himself or to settle his own problem. We were urged to consider the possibility that SP1 might have used the sum of RM1m to pay through the respondent to partly settle SP1's own outstanding compensation matter with Bill Chin and at the same time SP1 represented to SP6 and SP9 that the money was either for bribery or as political contribution to the UMNO Building Fund. In our judgment, it is even probable that SP1 could be doing this bearing in mind that there was evidence, even from SP1's own admission, that he had offered RM1.2m as settlement to Bill Chin. At p 59 of the appeal record at *jilid* 2A, SP1 testified as follows:

> Bill asked for about 2 million. We indicate that we will settle no more than 1.2 million.

[100] Even Bill Chin himself testified that he had authorised the respondent to receive all the monies as his compensation from SP1 when the correct quantum was agreed upon. Under cross-examination at p 204 of the appeal record at *jilid* 2B, Bill Chin had this to say:

> I have approached accused on compensation for Adiras pertaining to termination of Adiras because accused and SP1 were good friends. Accused was a senior person and a man of respect and SP1 was one of the member(s) in Selayang and as such I thought accused would be able to assist me. If accused can negotiate and get the compensation, he can later give the money to me, that is he can receive on my behalf and then later (give it) to me. I was expecting at least 1.5 million compensation.

[101] We have mulled through the evidence, and we are of the considered view that SP1 himself has cheated the Nusantara Board into thinking that RM1m was either for the respondent or as Bill Chin's compensation or even as a pure innocent business commission for the respondent.

THE CREDIBILITY OF SP1 AS A WITNESS

[102] In examination-in-chief, SP1 testified that Bill Chin told him after the Equatorial Hotel dinner that (see p 26 of the appeal record at *jilid* 2A):

> Bill Chin kata untuk sokong permohonan Dato' Saidin hendak 2 juta, 1 juta untuk dia dan 1 juta untuk MB Tan Sri Mohd Taib. I was shocked and disappointed because this is our Ketua Bahagian yang hendak duit kami ingat beliau akan tolong kami sebagai Ketua Bahagian. Saya lost my respect towards him. I told Bill Chin di bawah joint venture agreement this was Bill Chin's responsibility not ours.

[103] Continuing at p 27 of the appeal record at *jilid* 2A, SP1 testified:

> Bill Chin kata that is what that has got to be done to get the job.

[104] Before us, learned defence counsel for the respondent pointed out that the defence objected vehemently as to the evidence of SP1 pertaining to what Bill Chin said to SP1 as being hearsay (s 60 of the Evidence Act 1950; *Lim Ah Oh and Anor v Rex* [1950] MLJ 269; *Lejzor Teper v The Queen* [1952] AC 480 (HL); *Subramaniam v Public Prosecutor* [1956] MLJ 220 (PC); and *Leong Hong Khie v Public Prosecutor, Tan Gong Wai v Public Prosecutor* [1986] 2 MLJ 206 (FC)). According to learned defence counsel the trial court agreed with his objection that these hearsay statements need to be supported by Bill Chin himself in order for those hearsay statements to be admitted as direct testimonies thereby obviating breaching the rule against hearsay. The prosecution then gave an undertaking that Bill Chin would be called by them.

[105] True enough Bill Chin was called by the prosecution as a prosecution witness and he testified as follows (see p 206 of the appeal record at *jilid* 2B):

> I never informed anyone, SP1, Abu Zarin, Frankie or Khalili that accused actually asked for 2 (two) million political fund for UMNO as a condition for him to get approval for the land. Accused never solicit any money from me or Adiras.

[106] Bill Chin further testified under cross-examination and this was what he said (see p 198 of the appeal record at *jilid* 2B):

> Accused did not make any suggestion of any under counter money to me. Accused never solicited money from me for himself. Accused never asked for 2 (two) million, 1 (one) million for himself and 1 (one) million for Tan Sri Mohd Taib.

[107] Under cross-examination, Bill Chin exculpated the respondent and SP18 (Tan Sri Muhamad bin Muhamad Taib) of corruptly soliciting any gratification. And continuing at p 199 of the appeal record at *jilid* 2B, Bill Chin testified as follows:

> Question: So, if anyone were to suggest in this court that accused asked for money for himself and the MB, it would be totally untrue?
>
> Answer: Yes.

[108] Bill Chin continued to testify under cross-examination at p 199 of the appeal record at *jilid* 2B:

> Question: It is correct that during investigation, at least one officer from Badan Pencegah Rasuah was attempting to make (you) incriminate the accused.
>
> Answer: I wanted to tell the truth, they disagree, they more or less wanted me to incriminate the accused. Before statement was taken, as a witness, Badan Pencegah Rasuah interrogated me (for) several days and interrogation went to late at night. One occasion till 1.13 in the morning.

[109] Bill Chin's testimony favoured the respondent and SP18. As a prosecution's witness, Bill Chin's testimony weakened the case for prosecution.

[110] Now, SP1 suggested to the trial court that the dinner at Equatorial Hotel was held on 29 March 1995. At p 331 of the appeal record at *jilid* 2B, SP1 testified under cross-examination as follows:

> On 29.3.1995, this was the dinner in Equatorial.

[111] The date '29.3.1995' was quite significant because on that date, the respondent was still a member of the Exco Selangor. And SP1 purposely chose that date in order to implicate the respondent further before the trial court. But when confronted with the actual date of the dinner at Equatorial Hotel to be on 20 May 1995, SP1 had no choice but to agree. The respondent's diary marked as exh 'D48' at entry 'D48B' bore out the assertions that the dinner at Equatorial Hotel was in fact held on 20 May 1995 when the respondent was no longer an Exco member of Selangor. The notes of evidence at p 333 of the appeal record at *jilid* 2B showed the exchange between the parties:

Soalan: With all the documents shown to you, are you in a position to retract that the dinner never occurred.

Jawapan: I do have made a mistake in the extraction of the diary.

Peguambela: I show IDD 48 for date 20.5.1995. (Do) you see Dato' Saidin's writing, dinner with Bill Chin Equatorial Hotel.

Jawapan: Yes, I see it.

Soalan: The dinner that took place with you and the others were actually on that date 20.5.1995.

Jawapan: I can't be sure, it could be.

Soalan: If it's on 20.5.1995, that meeting was held when he was no longer Exco of Selangor.

Jawapan: Yes.

[112] It must be borne in mind that when SP1 initially gave evidence, he testified that he remembered the date because he wrote it in his 'book diary'. Later on he corrected his testimony and he said that it was his 'computer diary'. But SP1's private secretary ('SP26') confirmed keeping of 'book diary' and not 'digital diary'.

[113] SP1 testified further and he had this to say at p 331 of the appeal record at *jilid* 2B:

On 29.3.1995, this was the dinner in Equatorial. I only had one dinner with Dato' Saidin with the rest of them and there is only one entry and there is no cancellation which I would have captured and convince this was before election and he was still an Exco member. Election was on 25.4.1995. The date 29.3.1995 is correct.

[114] But, learned defence counsel cross-examined SP1 thoroughly and the exchange went like this (see p 331 of the appeal record at *jilid* 2B):

Soalan: I put it to you that meeting on 29.3.1995 never occured.

Jawapan: I deny on the basis of the evidence as on my diary.

Soalan: I put it to you, you have fabricated this diary to include 29.3.1995 as the date of the dinner.

Jawapan: I disagree.

[115] But when faced with the truth, SP1 crumbled under cross-examination (see pp 331–332 of the appeal record at *jilid* 2B):

Soalan: That date could not have been because Dato' Saidin have his Hari Raya Open House that night.

Jawapan: I don't know, I cannot remember.

[116] At this stage, learned defence counsel proceeded to prove conclusively that the 'open house' was on 29 March 1995 and that the meeting at the Equatorial Hotel must have been on 20 May 1995. The notes of evidence tell the story that SP1 had lied before the trial court about three significant matters:

(a) about the date;

(b) about the diary; and

(c) about the meeting that took place when the respondent was still an Exco member.

[117] The black and white photographs of the Hari Raya gathering at the respondent's house on 29 March 1995 as exhibited in the appeal records are not as striking and clear as the coloured ones. In open court, learned defence counsel showed a coloured photograph depicting a Hari Raya gathering at the respondent's house and the date 29 March 1995 was embossed on that coloured photograph. Another coloured photograph dated 30 March 1995 showed the Hari Raya gathering at the respondent's house spilling over on the morning of 30 March 1995. These two coloured photographs depicted the usual Hari Raya gatherings not only in the respondent's house but also elsewhere in the country. They also showed the presence of the respondent, SP1 and SP18 at that Hari Raya gathering on 29 March 1995 that spilled over to the next morning on 30 March 1995.

[118] In our judgment what transpired at the dinner meeting at the Equatorial Hotel was not proven by the prosecution according to the versions advanced by SP1 and SP11. SP1 testified that Bill Chin requested the others to leave the dinner room leaving the respondent and Bill Chin. And SP11 testified in this way (see p 213 of the appeal record at *jilid* 2B):

> Kami makan meja berasingan dan kemudian masuk dalam sebuah bilik di restoran itu saya panggil bilik itu bilik mesyuarat. Hanya Bill Chin dan OKT yang tinggai di bilik mesyuarat ini dan pengarah-pengarah lain semua keluar (i.e. left the restaurant), saya ingat dan mereka adalah SP1, Abu Zarin, Mohdi Mazlan, Frankie Lee dan saya.

[119] But Bill Chin testified differently at p 195 of the appeal record at *jilid* 2B:

> At Equatorial Hotel, I never had a meeting with accused alone (just the 2 of us in the absence of others) and I never requested the others, Frankie, Abu Zarin, Khalili, SP1 to leave me with accused alone.

[120] And at p 206 of the appeal record at *jilid* 2B, Bill Chin was quite categorical when he said:

> There was never a one to one meeting between me and accused and which I asked everyone to leave in Equatorial Hotel and there was never any one to one meeting between me and accused at other hotels.

[121] In our judgment, the prosecution witnesses consistently lied when they suggested that the dinner itself was in a room where all of them attended and later Bill Chin and the respondent were left alone. SP11, on the other hand, said that there were separate tables and that the dinner was not in a room. These are serious inconsistencies at the stage of soliciting gratification and we must therefore be cautious in our treatment of the evidence adduced by the prosecution.

[122] In a corruption trial, like the present appeal at hand, there will always be an interested witness and his evidence must be considered with great caution and it can be accepted when it is corroborated in material particulars by other evidence adduced by the prosecution. Here, SP1 was certainly an interested witness and his evidence was not corroborated by Bill Chin. In fact, Bill Chin's evidence contradicted SP1's evidence. And SP1's evidence too did not inspire confidence.

[123] SP1 further lied to the trial court when he said that he never attended the Hari Raya open house at the respondent's house. At p 333 of the appeal record at *jilid* 2B, SP1 testified as follows:

> I did not attend this function (referring to the respondent's Hari Raya open house on 29.3.1995). I normally do not attend an open house by nature. I don't attend big functions.

[124] But Azizah ('SP17') produced a photograph D54A with endorsement of the date 29 March 1995 and she confirmed that SP1 attended the Hari Raya open house at the respondent's house. Even SP18, as we observed earlier, attended the respondent's Hari Raya open house. It is disheartening to note that SP1 was willing to go that far in order to perpetuate his lies. The credibility of SP1 leaves much to be desired.

THE CONTROVERSIAL LETTER EXH 'P13'

[125] According to SP1, the covering letter in exh 'P13' together with the cheque for RM1m were placed in an envelope and was handed to the

respondent. Exhibit 'P13' was dated 15 March 1997 and it can be seen at p 873 of the appeal record at *jilid* 2E and it was addressed to the respondent from Nusantara. It was worded as follows:

> Yang Berhormat,
>
> Per: Sumbangan Syarikat Untuk UMNO Bahagian Selayang
>
> Kami kepilkan di sini sekeping cek (MBB No. 170871) bernilai RM1,000,000 sebagai sumbangan Syarikat kami kepada UMNO Bahagian Selayang.
>
> Adalah menjadi hasrat pemegang saham bumiputra kami supaya sumbangan kami ini digunakan oleh UMNO Bahagian Selayang untuk membantu dalam pembinaan Bangunan Pejabat UMNO Bahagian Selayang.
>
> Atas permintaan YB Dato' supaya diberikan cek tunai, kami telahpun membuat demikian tetapi kami telah mengambil keputusan untuk memalang cek tersebut kerana dikhuatiri ianya tercicir.
>
> Kami harap YB Dato' dapat mengeluarkan resit resmi dengan secepat mungkin.
>
> Yang Benar,
>
> NUSANTARA NETWORK SDN. BHD.
>
> Sgd. (Illegible)
>
> Frankie Lee
>
> Director.

[126] Exhibit 'P13' was a cover letter to the cheque of RM1m (exh 'P12'). The object of the cheque was purportedly mentioned in exh 'P13' as 'sumbangan syarikat kami kepada UMNO Bahagian Selayang' and that would be for the Selayang UMNO building fund.

[127] Exhibit 'P13' must surely be an important piece of document. Yet, it was never mentioned to the investigating officer by the name of Hishamuddin Hashim ('SP27') nor to Jamidan Abdullah ('SP28'). Both SP27 and SP28 confirmed that exh 'P13' was not used to confront the respondent when the respondent's statement was being recorded because ACA did not know of the existence of exh 'P13' at that point of time.

[128] In all probabilities, exh 'P13' was not in existence at the material time. It was prepared by SP1 and his conspirators for the trial before the trial court.

[129] The existence of exh 'P13' is very crucial. It shows the purpose for the issuance of the cheque for RM1m. SP6 testified that when he signed exh 'P13', the directors of Nusantara had agreed to give the monies to the respondent but in the resolution they were forced to write that the monies were meant for

contribution to UMNO Selayang. According to SP3, the payment voucher for the sum of RM1m showed that it was to be paid to Mikawa Sdn Bhd ('MIKAWA') — a sub-contractor of Bennes Engineering. Yet SP6 testified that payment was not made to MIKAWA.

[130] SP6 also testified that when he prepared exh 'P13' to accompany the cheque, he was not able to ascertain whether the monies would go to UMNO or to the respondent. And that was the reason that prompted SP6 to prepare exh 'P13' for SP1 to give it to the respondent. SP6 testified further that SP1 had asked for a cash cheque and not a cheque in the name of UMNO Selayang.

[131] Learned defence counsel for the respondent submitted that exh 'P13' was back dated and that it never existed on 15 March 1997. SP6 signed exh 'P13' dated 15 March 1997 but it was only received by the respondent on 29 March 1998 (see p 437 of the appeal record at *jilid* 2C). The fact of the matter was this. That when the respondent was questioned by the ACA through SP27 and SP28, exh 'P13' was not used by them to interrogate the respondent. At that point of time, it is safe to conclude that exh 'P13' was not in existence as yet for otherwise it would be used vigorously by the ACA against the respondent. That would be our judgment and we so hold accordingly.

[132] The learned High Court judge's treatment of exh 'P13' was quite spectacular. This was what Her Ladyship said in her judgment:

> By virtue of the material and unexplained contradictions in SP1's evidence concerning the issue whether the letter, P13, was given to Dato' Saidin in the envelope together with the RM1m cheque the learned SCJ ought to have ruled against the prosecution on that issue and to hold that SP1 was not telling the truth, and that there was a reasonable doubt raised in the prosecution case itself whether P13 did exist on 15 March 1997 as was alleged by SP1 and the other prosecution witnesses and whether even if P13 did exist on that date it was given to Dato' Saidin by SP1 together with the cheque as was alleged by SP1. The reason is because it is stated clearly in P13 that the cheque for RM1m is the contribution from Nusantara to the Selayang UMNO division. SP6 had testified that he prepared P13 upon the insistence of SP9 not SP1. So there was good reason for the learned SCJ to doubt the veracity of SP1's evidence on this issue. It would appear that the puppeteer who was calling all the shots in order to fix and frame up Dato' Saidin was none other than SP1.
>
> The learned SCJ appreciated that there was a serious doubt whether Dato' Saidin did receive the letter, P13, together with the cheque as testified by SP1. However, she erred when she ruled that the issue whether Dato' Saidin had received the cheque together with the letter was not important because Dato' Saidin had accepted the cheque corruptly just because he had banked it into his account.

A INVOCATION OF S 8 OF THE PCA BY THE TRIAL COURT

[133] We agree with the High Court that the trial court had wrongly invoked s 8 of the PCA against the respondent in her grounds of judgment because that section creates an entirely different offence from that of s 3(a)(i) of the PCA. Section 8 of the PCA stands independently from s 3(a)(i) of the PCA. Moreover the respondent was not charged under s 8 of the PCA. That section concerned bribery of a member of the legislature. That section reads as follows:

> Bribery of member of legislature.
>
> 8 Any person who offers to a member of Parliament or a State Legislative Assembly, or, being a member thereof solicits or accepts, any gratification as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour in his capacity as member, shall, notwithstanding that the member did not have the power, right or opportunity so to do, show or forbear, or that he did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the affairs of Parliament or a State Legislative Assembly, as the case may be, be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding seven years or to both.

[134] Learned defence counsel submitted that the trial court did not invoke s 8 of the Act at the end of the prosecution's case. He submitted that the prosecution did not rely nor invoke s 8 of the PCA at the close of the prosecution's case. He further submitted that the trial court was under a misconception that s 3(a)(i) of the PCA would be breached if s 8 of the PCA was transgressed. According to him s 8 of the PCA is a more serious offence than s 3(a)(i) of the PCA. He also submitted that the trial court thought that s 8 of the Act could salvage s 3(a)(i) of the PCA. He submitted that the trial court should not amend the offence to a higher offence. He submitted that s 169 of the Criminal Procedure Code ('CPC') prohibits it and the common law too is against it and public policy is also against it.

[135] We have perused through the appeal records and it is quite apparent that the trial court called the defence of the respondent for the amended charge under s 3(a)(i) of the PCA. At p 402 of the appeal record at *jilid* 2B, the notes of evidence carried this caption:

> 8 Jun 2001 (Keputusan) pada akhir pendakwaan.
>
> Setelah meneliti semua keterangan yang sedia ada, hujjah-hujjah pihak pendakwaan dan pembelaan dalam kes ini, Mahkamah memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kesnya terhadap OKT di bawah pertuduhan pindaan di bawah Seksyen 3(a)(i) Akta Pencegah Rasuah 1961 pada tahap prima facie kes dan oleh itu Mahkamah ini memanggil OKT untuk membela diri.

[136] After the three alternatives were explained, the respondent elected to give his evidence under oath and he too called eight other witnesses to support his defence. It is germane to mention that the respondent defended himself on an amended charge under s 3(a)(i) of the PCA and all his witnesses testified in relation to that amended charge.

[137] On 26 April 2002, SD9 — the final witness for the respondent, gave his evidence (see pp 544–557 of the appeal record at *jilid* 2C) and the defence closed its case.

[138] The parties then made lengthy submissions before the trial court.

[139] On 24 july 2002, the trial court announced its decision as reflected at pp 594–595 of the appeal record at *jilid* 2C. The respondent was convicted by the trial Court on the amended charge under s 3(a)(i) of the PCA. A draft decision was prepared by the trial court. In its original text, the decision of the trial court was worded in this way:

> Keputusan
>
> Intipati pertuduhan (tiga elemen)
>
> (1) OKT menerima untuk dirinya suatu suapan dalam bentuk satu cek Malayan Banking Berhad berjumlah RM1 juta daripada Dato Hanifah pada 15/3/1997.
>
> (2) Suapan yang diterima diterima secara rasuah.
>
> (3) Bahawa OKT terima suapan sebagai upah kepada dirinya kerana membantu Syarikat Nusantara mendapatkan kelulusan permohonan tanah daripada Majlis Mesyuarat Kerajaan Negeri Selangor (EXCO).
>
> Selepas Mahkamah meneliti dan menimbangkan kesemua keterangan dan hujjah Peguambela dan Pendakwaan, Mahkamah berpuashati bahawa pembelaan tidak berjaya membangkitkan apa-apa keraguan munasabah dan sebaliknya pendakwa telah berjaya sepenuhnya membuktikan kesnya di bawah Seksyen 3(a)(i) APR 1961 pada tahap melampaui keraguan munasabah.
>
> Oleh yang demikian, Mahkamah mendapati OKT bersalah di bawah Seksyen 3(a)(i) APR 1961 dan oleh itu mensabit OKT di bawah Seksyen yang sama.
>
> (Kes seperti deraf keputusan)

[140] On 1 August 2002, the mitigation of the respondent was advanced by learned defence counsel and the learned deputy public prosecutor responded. The trial court then imposed the sentence and gave bail pending appeal to the High Court.

[141] The written judgment of the trial court can be seen at pp 607– 632 of

the appeal record at *jilid* 2D and it was dated 1 August 2002. But before us, learned defence counsel submitted that two years after the respondent was convicted the trial court wrote the judgment and applied s 8 of the PCA. Learned defence counsel also submitted that s 8 of the PCA was used to bolster up the conviction and not 'by the way' as the prosecution said.

[142] Dato' Abdul Razak bin Musa for the prosecution acknowledged that the trial court made reference to s 8 of the PCA in her written judgment but he submitted that that was done by way of a comparison only ('buat perbandingan sahaja'). At pp 623–624 of the appeal record at *jilid* 2D, the judgment of the trial court made reference to s 8 of the PCA in this way:

> Namun, di sisi undang-undang, adakah seorang ADUN dibenarkan untuk menerima upah atau komisyen dalam memberi perkhidmatan kepada anak buah mereka?
>
> Menurut Seksyen 8 APR 1961 (Akta di mana Tertuduh dipertuduhkan), seorang ADUN, tidak boleh meminta atau menerima apa-apa suapan sebagai dorongan untuk atau upah bagi melakukan apa-apa perkara dalam kapasitinya sebagai seorang ADUN tidak kira sama ada ADUN ini mempunyai kuasa (power), hak (right) atau peluang (opportunity) untuk melakukannya atau beliau pada hakikatnya tidak melakukannya atau dorongan atau upah berkenaan tidak berkaitan dengan hal-hal Dewan Undangan Negeri, 'as the case may be', ADUN ini dianggap telah melakukan sesuatu kesalahan di bawah seksyen ini.
>
> Dari itu, adalah jelas bahawa Seksyen 8 tidak membenarkan seorang ADUN daripada menerima apa-apa suapan dalam kapasitinya sebagai ADUN dan di sini suapan termasuklah upah atau komisyen seperti didefinasikan di bawah Seksyen 2 Akta tersebut.
>
> Seksyen 8 APR 1961 ini mengandungi persamaan dengan Seksyen 2 Emergency (Essential Powers) Ordinance No. 22/1970 kerana Seksyen 2 Ordinan tersebut juga tidak membenarkan seorang ADUN dalam kapasitinya sebagai ADUN menggunakan kedudukan awamnya atau jawatannya (public position or office) untuk faedah kewangan atau lain-lain faedah (his pecuniary/other advantage).
>
> Isu yang timbul di sini ialah, Tertuduh tidak dipertuduhkan di bawah Seksyen 2 Emergency (Essential Powers) Ordinance No. 22/1970 atau Seksyen 8 Akta Pencegah Rasuah 1961. Beban dan tanggungjawab Mahkamah mungkin lebih ringan jika pertuduhan dibuat di bawah mana-mana satu undang-undang yang dinyatakan di atas. Ini adalah kerana kedua-duanya adalah khusus berkaitan dengan perlakuan seorang ADUN yang sedang memegang jawatan dan dalam kapasitinya sebagai seorang ADUN (while in office and in his capacity as a member) telah meminta atau menerima suapan sebagai upah untuk perkhidmatannya sebagai ADUN.
>
> Walau bagaimanapun, 'be as it may' Seksyen 3(a)(i) APR 1961 adalah seksyen yang am (general) dalam pemakaiannya dan sama ada Tertuduh seorang Exco, ADUN, penjawat awam atau bukan penjawat awam (private person) adalah tidak penting jika ia dapat dibuktikan bahawa apa yang diterima oleh Tertuduh di dalam suatu kes diterima secara rasuah.

Dari itu, Seksyen 3(a)(i) APR 1961 adalah luas pemakaiannya (all encompassing and all embracing) dan merangkumi kesalahan rasuah bagi seorang penjawat awam (public officers) termasuk Exco dan ADUN dan juga penjawat bukan awam (private persons).

Oleh itu, persoalannya di sini ialah adakah perbuatan Tertuduh yang menerima upah atau komisyen untuk perkhidmatannya melobi supaya permohonan tanah diluluskan oleh Exco merupakan satu perbuatan rasuah?

[143] It cannot be denied that the offence under s 8 of the PCA is an entirely different offence — separate and distinct, from that of s 3(a)(i) of the PCA. By virtue of s 158(1) of the CPC, the trial court is vested with the power to alter or amend a charge, at any time before judgment is pronounced (*Public Prosecutor v Heng You Nang* [1949] MLJ 285; *Oh Keng Seng v Public Prosecutor* [1974] 2 MLJ 48; *Anwar Hussain and another v The State* AIR 1952 Assam 47; *Harihar Chakravarty v The State of West Bengal* AIR 1954 SC 266; *Yoong Hock Pin v Public Prosecutor* [1977] 1 MLJ 178 (FC); *Public Prosecutor v James Tan* [1983] 2 MLJ 173; *Singah Mohamed Hussin v Public Prosecutor* [1973] 2 MLJ 109; *Public Prosecutor v Tan Kim Kang & Ors* [1962] MLJ 388; *Public Prosecutor v Datuk Haji Dzulkifli* [1982] 1 MLJ 340). That section is worded as follows:

Court may alter or add to charge

158

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

[144] Here, the trial court did not amend the amended charge under s 3(a)(i) of the PCA at the end of the prosecution's case or at the end of the defence case or before judgment was pronounced. Rather the trial court, in its written judgment, invoked s 8 of the PCA in order to convict the respondent for an offence under the amended charge of s 3(a)(i) of the PCA. That constituted a grave error in law that warranted appellate intervention.

[145] Learned defence counsel submitted that when the trial court invoked s 8 of the PCA, the trial court offended s 169 of the CPC. According to the trial court, the respondent as a member of the State Legislative Assembly ('ADUN') has contravened s 8 of the PCA and was therefore guilty of the offence under the amended charge of s 3(a)(i) of the PCA. But s 8 of the PCA is a major offence as compared to s 3(a)(i) of the PCA. And according to s 169 of the CPC, the court is empowered to convict a person of a minor offence although that person was charged with a major offence but it does not allow the court to convict that person of a major offence when he is charged with a minor offence.

A striking example of a minor offence is where the offender is charged for causing simple hurt which is a minor offence as opposed to a charge for causing grievous hurt which is a major offence as exemplified in the case of *Ram Prasad and others v State, through Jai Narain and another* AIR 1952 Allahabad 878.

[146] Dato' Sri Dr Muhammad Shafee Abdullah for the respondent pointed out that the defence was not alerted about the trial court's intention of invoking s 8 of the PCA against the respondent. There was thus a gross breach of natural justice as the respondent was in the dark and did not know what the real case against him was and this resulted in him being seriously prejudiced.

[147] The complaint of learned defence counsel for the respondent was this. That the trial court did not ask the defence about invoking s 8 of the PCA in deciding the culpability of the respondent under s s 3(a)(i) of the PCA. There was, so submitted learned defence counsel, a serious transgression when the respondent was not given the right to be heard in the interest of natural justice. A classic example would be the case of *Walter Annamunthodo v Oilfields Workers' Trade Union* [1961] AC 945 (PC). We need only refer to the headnotes at pp 945–946 to discover the facts and the principles thereto:

> The appellant, a member of a trade union, was charged before the general council of the union with offences against certain of the union rules. There was no power under those particular rules to expel him, since expulsion thereunder could be ordered only in the case of second or third offences and these were the first offences alleged against the appellant, for which under those rules a small fine only could be imposed. The appellant having been convicted of the offences charged, the general council purported to expel him under another rule, r 11(7), under which he had not been charged, which provided for expulsion where a member had been guilty of 'conduct prejudicial to the interests of the union'. The appellant had attended before the general council when the evidence was taken, but, owing to a previous engagement, did not attend the adjourned hearing a week later, when the charges were found proved. His expulsion was upheld on his appeal under r 11(7) to the Annual Conference of Delegates, whose decision under the rule was to be 'final and binding'. In an action by the appellant against the union claiming that his purported expulsion was ultra vires and void:
>
> Held, that r 11(7) was not a rule which merely empowered the general council to impose more severe penalties for the various other offences specified in the rules provided that the conduct of which a member was convicted under them was prejudicial to the interests of the union. Rule 11(7) created a separate and distinct offence and should not have been invoked for the purpose of expelling the appellant unless he had been given notice of the charge under it and had had a fair opportunity of meeting it. If a domestic tribunal formulated specific charges which led only to a fine, it could not without notice resort to other charges which led to far more serious penalties. When the general council at the adjourned hearing desired to proceed under r 11(7) the hearing should again have been adjourned so as to give the

appellant notice of the fresh charge, and by failing to do so the council had not observed the requirements of natural justice.

Further, the appellant had not, by appealing to the Annual Conference of Delegates, lost his right to complain of r 11(7) being invoked. By having appealed he did not forfeit his right to redress in the courts and could still complain that the original order was invalid for want of the observance of the rules of natural justice.

The decision of the general council convicted the appellant of an offence against the rules with which he had never been charged must be set aside and the purported expulsion declared invalid.

[148] As to the meaning of 'natural justice', the case of *Walter Annamunthodo* at p 949 explains it lucidly in this way:

'Natural justice' is not the same thing as sophisticated justice; the most famous passage on the point is in *Local Government Board v Arlidge* [1915] AC 120 138; 30 TLR 672 (HL). There are three basic elements which, by and large, make up the sum of natural justice: (i) The complainant must be given fair notice of the charge against him. (ii) He must have a fair opportunity of meeting that charge, and under that is included a fair hearing, (iii) The tribunal must reach a decision which is honest and unbiased. The authority for those three propositions is Bowen LJ in *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 383 (CA).

[149] When we talk about natural justice, we are referring to the specific procedural rights in the English legal system which are adopted by our courts. It concerns the duty to act fairly. Natural justice encompasses two basic rules, namely, the rule against bias (*nemo judex in causa sua*) and the right to a fair trial (*audi alteram partem*).

[150] The rule against bias is grounded on the need to maintain public confidence in our legal system. There are two forms of bias. Firstly, actual bias. Secondly, imputed bias or apparent bias. It is very difficult to prove actual bias. Whereas imputed bias, once established, will render a decision being void without the need for any investigation into the likelihood or suspicion of bias.

[151] Everyone is entitled to a fair hearing. Individuals should not be penalised by decisions that affect their rights or legitimate expectations unless they have been given prior notice about the case so that they have a fair opportunity to answer and to present their own case.

[152] To maintain public confidence in the legal system, the basic concept of impartiality must be adhered religiously. Lord Denning, the Master of the Rolls, in *Metropolitan Properties Co (FGC) Ltd v Lannon and Others*, *Regina v*

London Rent Assessment Panel Committee, ex parte Metropolitan Properties Co (FGC) Ltd [1968] 3 WLR 694; [1969] 1 QB 577 (CA), aptly said at p 599:

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

[153] Lord Hewart, the Lord Chief Justice of England and Wales, said that, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' (*The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at p 259).

[154] Here, the trial court invoked s 8 of the PCA in its written judgment written two years after the respondent was convicted without giving prior notice to the respondent or the respondent's counsel. Natural justice allows the respondent or the respondent's counsel to claim the right to adequate notification before the trial court invoked s 8 of the PCA in its written judgment. Chief Justice William Erie in *Cooper v The Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 at p 414 held that the lack of notice and hearing afforded to Cooper could be said to be a form of abuse as he had been treated as if he did not matter.

[155] And Lord Mustill in *Regina v Secretary of State for the Home Department, ex parte Doody, Same v Same, ex parte Pegg, Same v Same, ex parte Pierson, Same v Same, ex parte Smart* [1994] 1 AC 531 (HL), at p 560, had this to say about fair hearing:

> Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

[156] According to learned defence counsel for the respondent, if the trial court had invited the prosecution and the defence to address the bench in regard to the proposed invocation of s 8 of the PCA in its written judgment, he would have drawn the attention of the trial court as to the law particularly as to the right of the respondent to be heard. And if that opportunity was afforded, the trial court would be in a better position to write its judgment.

[157] We pause here for a moment and we have this to say. The trial court failed to direct itself on the crucial issue of whether it was safe to convict the respondent as per the amended charge under s 3(a)(i) of the PCA based solely on the evidence of SP1 without independent evidence of relevant circumstances connecting the respondent to the offence in question. Such failure amounts to a non-direction. It must be borne in mind that the

prosecution had elected not to prefer a separate charge against the respondent for corruptly soliciting RM1m and had elected to prefer a single charge for corruptly receiving RM1m. And in doing so, the prosecution sought to rely on the uncorroborated evidence of SP1 in order to drive home the point that the respondent had corruptly solicited RM1m in order to render the receipt by the respondent of RM1m crossed cash cheque a corrupt receipt under s 3(a)(i) of the PCA.

THE RIGOURS OF S 18 OF THE PCA

[158] The learned deputy public prosecutor drew our attention to s 18 of the PCA and he submitted that the High Court did not even consider that section in its deliberation. We venture to add that even the trial court overlooked s 18of the PCA. That section enacts as follows:

> Evidence of accomplice.
>
> 18 Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

[159] Salleh Abas CJ (Malaya) (as he then was) in the Federal Court case of *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379, at pp 380–381, traced the history of s 18 of the PCA in this way:

> Historically the provision is the re-enactment of s 13(3) of Prevention of Corruption Ordinance, 1950, which was wholly replaced by the 1961 Act. This provision was introduced in the 1950 Ordinance for the first time. Prior to this Ordinance, neither the FMS Prevention of Corruption Enactment (See FMS Enactment No 23/1938) nor those of the unfederated Malay States nor the Ordinance of the Straits Settlements (SS Ordinance No 41/1937) contained such provision. In Singapore the provision was introduced for the first time as section 24 in the Prevention of Corruption Ordinance No 39/1960, the revised version of which is the Act No 27/72 (Cap 104). Until the passing of the 1960 Ordinance, the law on this subject was the SS Ordinance No 41 of 1937, which was the same as the FMS Enactment No 23 of 1938. The corresponding legislation of the United Kingdom, ie Prevention of Corruption Acts 1906, 1916 and Public Bodies Corrupt Practices Act, 1889 upon which the Malaysian and Singapore legislation was based contain no such provision. It is, therefore, clear that this provision is a Malayan innovation introduced for the first time in Malaya in 1950 and accepted by Singapore in 1960.

[160] Section 13(3) of the Prevention of Corruption Ordinance 1950 is substantially in pari materia with s 18 of the PCA. The case of *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162 interpreted s 18 of the PCA. In that case, the appellant was convicted on a charge under s 4(a) of the PCA. The main

ground of appeal was whether PW1, the main witness to the charge on which the appellant was convicted, was an accomplice and whether as such he came under the protection of s 18 of the PCA. Syed Agil Barakbah J (later SCJ) who heard the appeal had this to say at pp 163–64 of the report:

> Now, s 13 of the old Ordinance is substantially in pari materia with s 18 of the Act. Section 18 reads though the word 'accomplice' does not appear, this section modifies the law and practice not as to accomplices generally, but only as to a specified class of accomplices so that a witness who is an accomplice only by reason of making a corrupt payment is not presumed to be unworthy of credit (see *Soosay Dass v Public Prosecutor* [1951] MLJ 57). If, however, he has played a more active part in the transaction apart from the bare payment, he is not protected by the section and the ordinary rules as regards accomplices apply (see *Daimon bin Banda v Public Prosecutor* [1953] MLJ 23). Considering the parts played in the case by PW1 in the circumstances there was no doubt that his action went beyond concurrence, because after concurring, he went to see his two colleagues, PW2 and Mahadevan, and suggested that each of them should raise the money to pay the appellant to which they all agreed. He did not make a report until after PW2 had told him that he (PW2) had already done so. In other words, he was quite prepared to bribe the appellant and negotiated with PW2 and Mahadevan on the matter. In my view, this amounted to an infamous conduct and therefore he was an accomplice in the real sense of the word.

[161] We categorically say that s 18 of the PCA modifies the law and practice in regard to a specified class of accomplices only. It is not of a general application. Where a person is an accomplice by reason of making a corrupt payment he is not presumed unworthy of credit. But where that person has played a more active part or an infamous part in the transaction apart from the bare payment, then such person cannot be protected under s 18 of the PCA and the ordinary rules as regards the evidence of accomplices will apply. This is the position of the law and seen in this light, SP1 cannot come under the protection of s 18 of the PCA and the ordinary rules of accomplice evidence would apply to him accordingly. To put it bluntly, the evidence of SP1 must be corroborated.

[162] Ong Hock Thye FJ in *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 at p 222 defined corroboration in this way:

> With respect, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused persons and tends to confirm that he is guilty of the offence …

[163] Gordon-Smith Ag CJ in *Tay Choon Nam & 2 others v Rex [in this case an application to the Privy Council for special leave to appeal was disallowed but the decision of the Board has not yet been received Ed MLJ]* [1949] MLJ 157

reproduced the rules laid down in *Rex v Lim Yam Hong* 14 SSLR 152 which were taken from the case of *R v Baskerville* [1916] 2 KB 658 as follows:

> Nor was there any conflict as to what the law is, which is well settled and I need only refer to it briefly. It is to be found in *R v Baskerville* [1916] 2 KB 658 and the rules laid down therein are admirably summarised by Woodward Ag CJ in *Rex v Lim Yam Hong* 14 SSLR 152 at p 156 as follows:
>
> (i) The uncorroborated evidence of an accomplice is admissible and a conviction founded on such evidence is not illegal.
>
> (ii) But it is a rule of practice equivalent to a rule of law that the presiding judge must warn the jury of the danger of convicting on such evidence.
>
> (iii) It is also his duty to tell them that nevertheless they can legally convict on such evidence.
>
> (iv) When it appears that the judge has not given the required warning, the Court of Appeal will quash the conviction.
>
> (v) One accomplice cannot corroborate another.
>
> (vi) The corroboration must be evidence which implicates the accused. Evidence tending merely to show that a crime has been committed is insufficient.

[164] Of course, corroboration of an accomplice evidence must come from a reliable and independent source which establishes that not only a crime had been committed but it was committed by the respondent. It must be borne in mind that if an accomplice could not be considered as a reliable or credible witness, just like SP1, then the question of corroboration does not arise (*Sarwan Singh Rattan Singh v State of Punjab* AIR 1957 SC 637 at p 641; and *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440 at p 452 (HL)).

THE PERTINENT FACTORS CONSIDERED BY THE HIGH COURT

[165] The High Court assessed the evidence that was led before the trial court and the High Court found that:

(a) SP1 regarded the respondent as a stumbling block in his path towards a successful political career;

(b) SP1 did not lodge a police report against the respondent;

(c) the respondent's conduct after receiving the RM1m cheque pointed categorically to the respondent's innocence rather than to his guilt and it also showed that the respondent did not receive the RM1m corruptly;

(d) SP1 did not write officially to the respondent to ask for the receipt for RM1m; and

(e) SP1 did not raise the matter concerning the receipt of RM1mat any of the

A UMNO Selayang division meetings.

NO POLICE REPORT LODGED BY SP1

B **[166]** In our judgment, it is a very significant factor for us to consider that SP1 did not lodge a police report to complain that he was forced by the respondent to give the respondent the cheque and only when SP1 wanted to contest the Selayang UMNO division head's post that SP1 sent SP24 to intimidate the respondent with a copy of the cheque and asked the respondent C through SP24 to withdraw or face dire consequences later. Indeed the absence of a prior police report by SP1 affected greatly his credibility as a witness and his veracity when he testified in court against the respondent. The High Court acknowledged this fact and held that there were unsatisfactory features surrounding SP1's oral evidence before the trial court.

D

POLICE REPORT LODGED BY THE RESPONDENT

[167] The respondent had lodged a police report against SP1 for blackmailing the respondent through an intermediary in the person of SP24. E The High Court considered this very pertinent point but the trial court did not pay any serious attention to it.

[168] Had the trial court considered this point, the trial court would have found that there was a reasonable doubt raised in the prosecution's case in that F the receipt of the cheque by the respondent was done in the course of a lawful and legal business deal between SP1 and the respondent and not corruptly as was painted by SP1.

G THE EVIDENCE OF SP18 (TAN SRI MUHAMMAD BIN MUHAMMAD TAIB)

[169] SP18 was the prosecution witness and he testified that:

H (a) no favour was required to support Nusantara's application because the application was well supported by the various land authorities and there was a need to privatise the land as it would save the government from spending money;

(b) the respondent never met him in any suspicious manner in relation to I Nusantara's application;

(c) the respondent as an ordinary ADUN can do business of land transactions to gain commission earnings and this is allowed;

(d) as long as the respondent was not a member of the Exco (the body that

approved land applications), the respondent could negotiate for commission to lobby for land approvals without fear of breaching the law on corrupt practices;

(e) that SP1 should know about the proper method of giving donation to UMNO;

(f) he has never heard of a political donation by way of a 'crossed cash cheque';

(g) that the 1995 election date was only known two weeks earlier; and

(h) that the election date was on 25 April 1995 and SP1's claim that he knew it in March 1995 was 'karut'.

[170] The High Court accepted the evidence of SP18 to the effect that Nusantara's application was approved by the Selangor State Exco based on its merits as it was the best proposal as compared to the other two applications.

[171] The High Court also accepted the evidence of SP18 to the effect that the respondent was not a member of the Selangor State Exco at the material time and was only a State Assemblyman and that in that capacity there was nothing wrong for the respondent to be paid a commission for assisting Nusantara's application because what the respondent did was perfectly legitimate in that it did not contravene any law or regulation.

[172] But the trial court considered fleetingly the evidence of SP18 in this manner (see pp 610–611 of the appeal record at *jilid* 2D):

> Tan Sri Muhamad Taib (SP18), yang ketika itu menjawat jawatan Menteri Besar Selangor, telah menyatakan bahawa adalah menjadi satu amalan biasa bagi seseorang wakil rakyat, termasuk Tertuduh sendiri, untuk meminta beliau segera meluluskan projek di dalam kawasan pilihanraya mereka dan Tertuduh ada berkemungkinan berjumpa beliau berkaitan permohonan tanah ini. Walau bagaimanapun, permohonan NNSB mengikut beliau telah diluluskan oleh Exco berdasarkan merit.

[173] The trial court also made a brief reference to the evidence of SP18 at p 622 of the appeal record at *jilid* 2D in this way:

> Tertuduh seperti dipersetujui oleh pembela, telah menggunakan jawatan dan pengaruhnya untuk melobi pihak-pihak berkaitan seperti Encik Zulkifli bin Ahmad, Setiausaha Exco (SP15) dan Menteri Besar pada ketika itu, Tan Sri Muhamad Taib (SP18) bagi mendapatkan kelulusan permohonan tanah NNSB.

[174] We are constrained to say that the evidence of SP18 weighed heavily in

favour of the respondent. Of pertinence, SP18 testified that a State Assemblyman can receive commission for lobbying the State Exco and that it was not against the law. If what SP18 said was untrue, the prosecution should have impeached his credit before the trial court but the prosecution failed to do so.

THE DEFENCE OF PURE BUSINESS COMMISSION TO THE RESPONDENT

[175] The senior deputy public prosecutor criticised the respondent's defence and he submitted that the:

> Defence of the respondent is to lobby in order to get the approval so that he is entitled to the RM1 million as a commission. Lobby to get the money and he considers it as a commission.

[176] The learned deputy further submitted that:

> Modalnya ialah dia sebagai wakil rakyat, ADUN sahaja. Responden bukan peguam, arkitek dan tidak ada professional knowledge dalam perkara melainkan kedudukan dan pengaruh dia sahaja.

[177] The learned deputy further emphasised that the:

> Responden bukan ahli Pengarah Nusantara. Responden gunakan pengaruh beliau. Responden bukan shareholder Nusantara.

[178] Continuing further, the learned deputy submitted:

> Rasuah berbeza dengan business deal. Hakim Mahkamah Tinggi tidak 'focus on the charge' dan beliau mengambil kira perkara-perkara persekitaran untuk menyatakan wang itu bukan wang 'corruptly received'.

[179] Still on the same subject matter, the learned deputy submitted that:

> Lobbying is not wrong. Kecuali ada cerita di sebaliknya. Setuju gratification is also upah.

[180] Finally, the learned deputy handed to us an article on 'lobbying' which he downloaded from the internet. That article makes for an interesting reading material and it is worded in this way:

> Lobbying vs Bribing

Lobbying, in general, refers to the act of trying to influence members of a legislative body to vote in favour of the 'lobbyist'. In some governments, 'lobbyists' have formally recognised groups, whose interests are 'lobbied' for, that may be wholly or partially funded by organisations, or even nations. On a softer side, lobbying may just involve political support offered in return for political influence, or action. Lobbying that is legalised by a government does not involve financial support.

Bribery, on the other hand, involves offering money in return for political action or influence. Often this bribery comes in cash form, without involving *bank* transactions, and this is one of the reasons many lobbyists have *been* accused of bribery. Therefore, bribery is when money contributions are made to a political group in expectation of being favoured in political or legislative decisions. Priorities and decisions of legislators, governors, councilmen and the President alike, are defined by money handouts by lobbyists.

At times, there seems to be just a fine line between the two. Lobbyists have become very aggressive in pushing for their agendas, and this has led many to think that their practices have become unacceptable, as it unfairly swings the political landscape in favour of the rich and the big corporations that can use their monetary influence. Definitely, this kind of system has *major* drawbacks, since the concerns of the 'common man' will not matter if they are contrary to the interests of the big businesses. Some business leaders have such a grip on the avenues to power, that the gap between the businesses and the file and rank (who are the customers) is very wide.

Precisely put, bribery is when a business, individual or a group of individuals, offer cash or property in exchange for a specific influence in their favour. For instance, when a legislator tells his constituent that he will vote for certain *legislation* in return for a certain amount of money, then that is bribery.

Many times, proving a bribe can be as hard as it can be to distinguish between bribery (which is illegal) and lobbying (which is legal in some governments), unless informers are used. Informers will have to offer the real bribes, and tape the officials accepting the money offers. Alternatively, If there's some written agreement with the official consenting to the bribery, it could also prove the acceptance of a bribe. Otherwise, proving a connection between the two parties without tangible evidence can seem like a 'mountain to climb'.

Summary:

Lobbying is trying to influence politicians to decide in your favour, while bribing means the same, except that there is an offer of money or property.

Lobbying is legal (although contentious), while bribery is out rightly illegal.

[181] We decide this appeal based entirely on the evidence adduced. The defence advanced by the respondent was considered by the trial court and the High Court. This court too must consider the defence of the respondent in its entirety.

[182] There is nothing wrong in making a commission. It has been

sanctioned by this court in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 (CA). In that case, there was an application by the appellant to convert and subdivide the land. The respondent promised to assist in obtaining approval of the application. In return, the appellant promised to pay the respondent RM268,888 for that service. That consideration, namely the exchange of mutual promises, although executory, was held to be a good consideration. It was also held that there was a binding agreement between the parties. It was further held that the submission that the respondent did nothing to earn his fee was unmeritorious. The respondent had expended his exertions in securing the Menteri Besar's support for the appellant company's application, and the application had in fact been approved. It was held that the respondent's actions came within the terms of s 2(d) of the Contracts Act 1950 which provides that when the promisee has done something at the desire of the promisor, such act is a consideration for the promise.

[183] Gopal Sri Ram JCA (later FCJ) writing for this court in *Wong Hon Leong David v Noorazman bin Adnan* aptly said at pp 289–290:

> It is convenient for us to take the second and third points first. They have to do with the question of consideration. The appellant argued that there was no consideration for the agreement between the parties. The judge held there was. In our view, the learned judge was right.
>
> The argument based on absence of consideration, in our view, overlooks the fundamental principles governing this area of the law of contract. The facts relevant to the point are these. There was the promise made by the respondent that he would assist in obtaining the required approval for conversion and sub-division of the company's land. The appellant in turn promised, and this is common ground, that he would pay the respondent RM268,888 for that service, One therefore has in the present case, ab initio, a promise in exchange for a promise. In our judgment, this is good consideration in law. We shall explain momentarily why we hold this opinion.
>
> Now, it is well settled that consideration may be executory or executed. If A agrees to mow B's lawn for RM10 and B agrees to pay him RM10 in exchange for this service, there is, in the eyes of the law, a valid and binding agreement between A and B. This is borne out by the words of s 2(e) of the Contracts Act 1950 which declares: 'every promise and every set of promises, forming the consideration for each other, is an agreement.'
>
> The consideration in such a case is said to be executory, namely, the exchange of the mutual promises. When the lawn is mowed, the act promised has been done and the consideration is said to have become executed. It is not and has never been the law of this country that to support an agreement, consideration must always be executed. Executory consideration suffices. Of course, A's right to sue for the RM10 may not arise until he has performed his part of the bargain or has been prevented by B from performing it.
>
> The illustration we have given and the principle we have stated are so elementary that they may be found in any standard work upon the subject. But we have been compelled to do so because a reading of the judge's note of the proceedings in the

court below has left us with the distinct impression that these elementary propositions may have been misunderstood by the appellant and by the court.

The submission that the respondent did nothing to earn his fee is equally unmeritorious. To recall, upon the facts in respect of which the appellant raises no dispute, the respondent did expend his exertions in securing the Menteri Besar's support for the company's application. The approval, much sought after by the appellant and the company, was obtained. In the words of counsel for the appellant when he addressed us on this point, 'the respondent delivered the goods'. In the light of this telling concession, it is an amazement that the appellant is able to submit that the respondent did nothing to earn his fee.

[184] Another case in point would be that of *Ahmad Zaini bin Japar v TL Offshore Sdn Bhd* [2002] 1 AMR 369, a decision of the High Court. In that case, the plaintiff claimed against the defendant the sum of RM11.3m, being the balance sum due and owing to him consultancy services rendered pursuant to an oral agreement entered into between the parties. The plaintiff claimed that the defendant had pursuant to the oral agreement, sought, inter alia, his assistance in procuring a contract for the defendant with Petronas Carigali Sdn Bhd ('the Petronas contract'). As consideration for securing the Petronas contract, the defendant agreed to pay the plaintiff for his advisory services, an amount equivalent to 1% of the contract value limited to a maximum amount of RM12m. Having successfully secured the Petronas contract for the defendant, the plaintiff was paid RM700,000 by way of two separate payments of RM500,000 and RM300,000 made out to two of the plaintiff's companies. But the defendant failed and/or refused to pay the plaintiff the balance sum of RM11.3m despite repeated requests and demands and as a result the plaintiff applied for and was granted summary judgment against the defendant. The defendant had admitted owing the balance sum due and owing by way of a letter signed by Syed Mohd Alwi Syed Mustaffa ('Syed Alwi'), the executive director of the defendant. The said letter on the balance of probabilities showed that the plaintiff had indeed secured the Petronas contract and would be paid 'up to the sum of RM12m being 1% of the contract sum'. The High Court held that there were no triable issues and that there was no need for the plaintiff to concern himself with nor inquire into the regularity of the internal affairs of the defendant company and was entitled to assume that all was being done regularly: *omnia praesumuntur rite ac solemniter esse acta*; and that the plaintiff had no knowledge of the internal affairs of the defendant company and was entitled to claim the benefit of the rule in *Turquand*'s case (*The Royal British Bank v Turquand* (1856) 6 El & Bl 327; (1856) 119 ER 886). The High Court also held that the plaintiff had kept to his promise by securing the Petronas contract for the defendant and the defendant must in turn keep to its promise to pay the plaintiff for the services rendered. The High Court further held that what the plaintiff did fell within the ambit of s 2(d) of the Contracts Act 1950 in that the promisee had done something at the desire of the promisor and the act of the promisee can be construed as a consideration for the promise. And

A that the exchange of mutual promises, although executory, was a good consideration under s 2(e) of the Contracts Act 1950. In the circumstances, there was a binding oral agreement between the parties, and that oral agreement was not against public policy.

B **[185]** Abdul Malik bin Ishak J (now JCA) had this to say in *Ahmad Zaini*'s case on the issue of public policy (see pp 453–454 of the report):

> And 'marching' with the times, the contract between the parties in the present case can never be construed as a contract that run counter to the Malaysian public policy.
C This was my judgment and I so hold accordingly. I am entitled to come to this conclusion because to borrow the words of Lord Lyndhurst in *Egerton v Brownlow* 4 HLC 1,161:
>
> > Each case must be determined according to its own circumstances.
>
D Viscount Haldane in *Rodriguez v Speyer Brothers* [1919] AC 59, at p 79 aptly said in almost the same vein that:
>
> > … what the law recognises as contrary to public policy turns out to vary greatly from time to time.
>
E Sir James Colville in *Evanturel v Evanturel* [1874] LR 6 PC 1 at p 29 in graphic words said:
>
> > It was well observed during the argument that the determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time.
F Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.

G **[186]** And at p 455 of the report in the same case, His Lordship continued in this vein:

> Now, in the context of the present case, the plaintiff had expended his exertions in securing the Petronas Carigali contract and he was successful in his endeavours.
H What the plaintiff did came within the ambit of s 2(d) of the Contracts Act 1950 in that the promisee had done something at the desire of the promisor and the act of the promisee can be construed as a consideration for the promise. This was indeed a simple case of a promise in exchange for a promise. The plaintiff promised that he would assist in obtaining the Petronas Carigali contract. In return the defendant promised to pay the plaintiff RM12m for that kind of service. The exchange of
I mutual promises, although executory, was a good consideration under the law (see s 2(e) of the Contracts Act 1950). There was, in my judgment, a binding agreement between the parties hereto.

[187] With respect, it is not necessary for the respondent to be a lawyer or an

architect in order to assist Nusantara in its land application and ultimately secure success in obtaining the land. As an ADUN, the respondent is allowed to carry out any trade or business and if he is promised a commission and such commission is given and received by the respondent, like the present appeal at hand, that is in law considered legally permissible under s 2(d) of the Contracts Act 1950. The respondent was able to 'sweet talk' his way with SP18 and that can only be attributed to his talent as an ADUN and he should not be penalised for it. We venture to say that there is no law which prohibits the respondent from obtaining a commission for helping Nusantara's land application to be approved.

DUTIES OF MEMBERS OF THE STATE LEGISLATIVE ASSEMBLY

[188] 'Corruption' is an ugly word. It is easy to allege but it requires a heavy burden to prove it in a court of law: must prove beyond a reasonable doubt. The criminal law of corruption is rather complex. It involves a host of legislations: the PCA, the CPC, the Evidence Act 1950, the Penal Code, etc, and a long list of authorities emanating from within and outside our shores.

[189] As an ADUN, the respondent was not placed in the position of conflict of interest. He was not a decision maker. He was not a member of the State Exco. He was merely an ADUN who assisted Nusantara in its application for the land. He has not compromised his position as an ADUN. He has not breached his oath of office. He has no quorum to declare to. He takes care of his constituents and his constituency. The gratification he was alleged to receive corruptly was not proved beyond reasonable doubt.

[190] We are not concerned with a moral wrong. We are only concerned with a legal wrong.

[191] There is nothing reprehensible when an ADUN makes a commission legally and legitimately. But that commission must not be corruptly received in the context of s 3(a)(i) of the PCA.

[192] The entire story about donation to UMNO is not true. The respondent asked for a commission and he received the commission. It was not received corruptly. If the respondent took the money meant for UMNO, he is guilty of criminal breach of trust under s 405 of the Penal Code. But here, the respondent was not charged for criminal breach of trust. Moreover, the report ('P41') by Hishamuddin bin Hashim — the investigating officer, made no reference to money meant for UMNO. And his report was contemporaneous with the events that took place then.

[193] As an ADUN, the respondent performs a public duty to his

constituents. In *Habibulla Khan v State of Orissa and another* [1993] Cri LJ 3604, it was held that, 'An MLA (Member of the Legislative Assembly) does hold an 'office' and performs 'public duty' by virtue of holding that office as would appear from Chapter III of Part VI of the Constitution'.

[194] And the respondent too discharged his constitutional duties as an ADUN member. In this context, reference should be made to the case of *Padmakar Balkrishna Samant v Abdul Rehman Antulay and another* [1984] 2 SCC 183, at para 58 at p 234 where Desai J (delivering the judgment of the court) had this to say, 'He (referring to a member of the Legislative Assembly) no doubt performs public duties cast on him by the Constitution and his electorate. He thus discharges constitutional functions for which he is remunerated by fees under the Constitution and not by the executive'.

[195] There is a specific provision on what an Exco member should not do under art 53(8) of the Laws of the Constitution of Selangor which is identical to the Eigth Schedule, 2(8) of the Federal Constitution. For ease of reference, art 53(8) of the Laws of the Constitution of Selangor is now reproduced:

> 53 (8) A member of the State Executive Council shall not engage in any trade, business or profession connected with any subject or department for which he is responsible and shall not, so long as he is engaged in any trade, business or profession take part in any decision of the State Executive Council relating to that trade, business or profession or in any decision likely to affect his pecuniary interests therein.

[196] Since the respondent was not an Exco member, he was and is allowed to engage in any trade, business or profession. And we may add that when the respondent received the commission in good faith with no corrupt intent, in the course of his trade or business, he cannot be charged nor convicted for an offence under s 3(a)(i) of the PCA.

CONCLUSION

[197] We have given our careful thought to the submissions made on either side in the context of the evidence on record. We are of the view that neither the quality of the materials produced nor their proper evaluation could be held to be sufficient to prove the prosecution's case beyond reasonable doubt. We are not inclined to record a verdict of guilty against the respondent on such slender and doubtful evidence.

[198] Accordingly, we affirm the decision of the High Court and dismiss the appeal of the appellant forthwith. We hereby set the respondent free.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar